UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
32nd meeting
held on
Thursday, 7 November 1991
at 10 a.m.
New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)

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91-57208 5185S (E)

Distr. GENERAL
A/C.6/46/SR.32
12 November 1991

ORIGINAL: ENGLISH

The meeting was called to order at 10 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. TETU (Canada) recalled that the International Law Commission had first taken up the draft Code of crimes against the peace and security of mankind in 1947; the time gap since then highlighted the difficulty of achieving consensus on the composition of substantive offences and on procedural and related questions. However, in the light of increased international cooperation in the post-cold war era and the threat to all States caused by the most serious international offences, the time was ripe for a major effort to produce a workable scheme which would deter prospective perpetrators and, if not, ensure prosecution and punishment in accordance with the rule of law.

2. He noted that the Commission indicated in paragraph 173 of its report (A/46/10) that it was mindful that the draft Code was still open to some improvements. His delegation felt that there was a need to provide for the relationship between the draft Code and existing multilateral conventions that addressed the crimes listed in the Code; in some cases the draft Code used the definitional language of those conventions, in others it did not. There was also the even more basic question of the completely new international crimes created in the draft Code, as well as the problem of lack of clarity in the drafting of some of the provisions.

3. His delegation was concerned that the definition of international terrorism in article 24 covered only individuals who were agents or representatives of States; the definition should also encompass acts of international terrorism covered by the existing network of multilateral anti-terrorism conventions which were committed by persons not acting on behalf of a State. His delegation disagreed with the idea that State-sponsored terrorism should be distinguished from international terrorism by groups not acting on behalf of a State; to limit the scope of the draft Code in that way would create a lacuna into which the vast majority of terrorist acts would fall. The phrase "acts against another State directed at persons or property" should be clarified, and it should be made clear whether it covered hijacking of aircraft and maritime vessels.

4. The linchpin of the draft Code was the obligation expressed in the maxim aut dedere, aut judicare. The language used in article 6, paragraph 1, of the draft Code, in providing that the State where an alleged offender was present "shall either try or extradite him" overlooked the wording in the multilateral anti-terrorism conventions. Many States would only be able to agree to that type of obligation if it met the concerns and demands of their domestic criminal law processes. His delegation restated its commitment to the prosecution and punishment of the most serious international crimes that caused irreparable harm to the international and national rules of law.

(Mr. Têtu, Canada)

However, article 6, the word "try" must be replaced by language that took into account evidentiary requirements. The phrase used in the multilateral anti-terrorism conventions could serve as a guideline; there would then be an obligation either to extradite or to submit the case to a State's competent authorities for the purposes of prosecution. Moreover, if the obligation to extradite was to be workable, it should be stated that the offences contained in the draft Code were to be considered as extraditable offences between States parties which had bilateral extradition treaties and that the draft Code could be used as a vehicle for extradition between those States whose domestic law required a bilateral treaty, where one was not in existence. Consideration should also be given to whether the political character of the offence as an exception to extradition should be explicitly excluded or whether it was sufficient to have a general provision as contained in article 4, supplemented by the obligation aut dedere, aut judicare.

5. On the issue of penalties, if the Code was to operate without an international criminal court, the approach taken in the multilateral conventions was the most workable one: States parties would then be obligated to impose severe penalties that took into consideration the heinous nature of the crime. If an international criminal court was established, it might be preferable to establish specific penalties designating a minimum and a maximum. His delegation felt that a penalty of community work was not compatible with the nature of the heinous offences in the draft Code. However, confiscation of property acquired as the proceeds of the criminal act should be included. That concept played an important role in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and was also in keeping with the criminal legislation of many countries. Further studies should be done on who the beneficiary of such drug-related money should be. Other penalties in the nature of punitive fines might be appropriate in some circumstances.

6. Without an international criminal court, the draft Code would be subject to enforcement by national criminal jurisdictions. The matter of the court could not be discussed in practical terms until draft proposals as to its composition, prosecutional system and finances, and the enforcement of its sentences, were on the table. States would have to confer jurisdiction on the court and it would be necessary to determine the most workable relationship between such a court and national courts. An international criminal court could provide impartiality and objectivity and could give valuable support to the strengthening of international criminal law and cooperation between States. However, the sensitive issue of whether domestic courts or an international criminal court would have primacy of jurisdictional competence would need careful consideration. Further consideration should also be given to the advisory capacity of an international criminal court on questions of interpretation of international criminal law issues.

7. Mr. ROUCOUNAS (Greece) said that since the draft Code of crimes against the peace and security of mankind had been approved on first reading, it would be easier to determine its degree of autonomy and field of application. In the second reading, the Commission would no doubt consider the question of whether the reference to international law should be retained in article 1; yet, if the crimes defined in the Code were not crimes under international law, it was not clear how they could be considered as crimes against the peace and security of mankind. Part I contained provisions that were an essential part of the Code, such as articles 2, 5, 7 and 11; the Commission would now have the delicate task of identifying possible points of similarity with domestic law. Article 6, on the obligation to try or extradite, raised the question of efficacy and, in its final form, that obligation would be linked with the decision of the competent judge, whether national, international or both. Other matters covered in part I, for example in articles 3, 4, 8, 9 and 14 had been included because they were a vital part of the Code and derived from general principles of domestic criminal law.

8. Part II of the draft Code identified 12 particularly heinous crimes; the problem now lay in formulating definitions of them. In some cases, such as genocide (art. 19), the Commission used the definition in the 1948 Convention. In the case of the definition of aggression (art. 15) it had referred to General Assembly resolution 3314 (XXIX), "Definition of Aggression", and tried to make the definition as limited as possible. However, problems remained, such as the question of penalties for genocide as defined in the Code and genocide as defined in the relevant Convention and, in the case of aggression, the question of determining the influence of lack of action on the part of the Security Council.

9. The Commission's abandonment of a distinction between three types of international crimes (as explained in the commentary to part II) did not seem to have consequences for the substance of the draft Code. The standard format for identifying the persons to whom responsibility for each of the crimes listed in the Code could be ascribed could not be regarded as exclusive in nature.

10. The Commission had added to the draft Code the crimes of apartheid, systematic or mass violations of human rights, exceptionally serious war crimes and wilful and severe damage to the environment; some improvements and adjustments would probably be needed in those new areas. That applied, for example, to the inclusion in article 26 of the formula of "widespread, long-term and severe damage" used in article 55 of Protocol I Additional to the 1949 Geneva Conventions, which seemed to give a new dimension to the question of "long-term" damage.

11. His delegation had always felt that it was necessary to establish an international criminal court; the broad discussions of that question in the Committee should enable the General Assembly to make the Commission's mandate more specific in that respect. The Commission should continue to work on more

(Mr. Roucounas, Greece)

than one model and in particular should consider the possibility of giving exclusive competence to an international criminal court for a limited number of crimes against the peace and security of mankind. For other crimes, it should consider concurrent competence with national courts.

12. Mr. RAZAFINDRALAMBO (Madagascar) said it was regrettable that the Commission had not made more progress in its consideration of international liability for injurious consequences arising out of acts not prohibited by international law and was still considering the underlying questions and even questioning the value of the topic and its objective. There had been sufficient consideration of the matter in the Commission and the Committee to enable the Special Rapporteur to find some answers to the fundamental questions raised in his seventh report. The General Assembly should invite the Commission to accelerate the work already undertaken in the area defined in article 1 of the draft (scope of the articles) and the Drafting Committee should rapidly consider all the articles that had been submitted to it. Since the Commission had made significant progress on three other major items on its agenda, high priority should be accorded to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", so that efforts would be successful by the end of the next quinquennium.

13. His delegation did not support the idea that the Special Rapporteur should direct his attention to the question of a multilateral instrument emphasizing the protection of the natural environment, because that would only call in question the positive results of several years of in-depth consideration and unduly delay the conclusion of the Commission's work. Moreover, it was not in the interest of developing countries to dilute the subject within the much broader context of damage caused to the environment. Since those countries had neither the financial resources nor the necessary technical know-how to prevent or minimize the adverse consequences of activities carried out under their own jurisdiction or control, in respect of prevention and reparation they had a greater need than the industrialized countries for clear and strict norms of responsibility determining the respective role of the State of origin and the victim State, strictly at the bilateral level, taking into account the specific situation of each country. In that respect, article 3 and article 6 should be strengthened by a more general provision recognizing the special situation of developing countries.

14. Turning to particular questions raised by the Special Rapporteur in his seventh report (A/CN.4/437), he noted that the problem of the title concerned only the English version of the text. His delegation felt that the use of the word "activities" in English would not fundamentally change the terms of the Commission's mandate. The Commission had in no way envisaged a "wrongful act" as a specific and isolated act but had determined that it could be an act "having a continuing character" or a "series of actions or omissions" (art. 25, draft articles on State responsibility). His delegation felt that the alignment of the English text of the title with the French text was perfectly legitimate.

(Mr. Razafindralambo, Madagascar)

15. As to the nature of the instrument, the Commission did not normally discuss that question before adopting a draft as a whole, at least on first reading. While it was possible that some would more easily accept hypotheses or draft articles of an instrument that would not have binding force, the reverse could also be true. His delegation was therefore in favour of formulating a framework convention with binding force. On the question of the scope of the topic, his delegation had already endorsed the view of the Special Rapporteur that the topic should deal with activities involving risk of causing transboundary harm, as well as those actually causing such harm, and the definition he had made in his sixth report of activities involving risk and harmful effects, as well as the method of treating those categories together under a single legal regime, while taking into account the special features of each category of activities. However, the regime of prevention should essentially involve the obligation to take unilateral legislative or administrative measures which would be selected by each State. The fact that it was necessary to determine the nature of risk in the context of the topic, particularly in the articles concerning prevention, where the problem of threshold arose, was not an obstacle to establishing a single regime, because the problem arose in respect of both risk and harm. His delegation felt that the list of dangerous substances should form an annex as in the case of conventions on the prevention of marine pollution.

16. With regard to prevention, the procedural measures suggested by the Special Rapporteur should be simplified and should be indicative in nature so as not to impede the freedom of States to act without foreign interference set forth in article 6 of the draft. If necessary, a more detailed procedure could be set forth in an optional protocol. Only unilateral preventive measures designed to minimize risk should be imposed, because they derived from the obligation of due diligence including, in accordance with general international law, the obligation to make reparation for cases of possible negligence. At all events, all the principles set forth should be drafted in the most general terms possible.

17. The fundamental importance of reparation was indisputable by virtue of the maxim sic utere tuo ut alienum non laedas and of the principle that the innocent victim should not be left to bear the loss alone. There was no doubt that because of their state of economic underdevelopment and financial dependence on the industrialized States and international financial institutions, third world countries would benefit from specific criteria that would establish a more equitable balance of interests.

18. On the question of the relation between civil liability and State liability, his delegation was in favour of giving priority to civil liability as a primary obligation in the current situation of liberalization and growing privatization of national economies; it was only when activities could be attributed exclusively to a State that direct State liability could be envisaged. However, his delegation would not exclude joint or residual liability of the State when a State failed in its duty of prevention by

(Mr. Razafindralambo, Madagascar)

failing to take unilateral preventive measures or to respect those that were mandated; if a State did take such measures it would still have a residual liability based on risk, on the profit it derived from the activity and indeed on the principle of equity.

19. On the question of determining what harm should be compensated, his delegation believed that only appreciable or major harm should give rise to compensation, again for reasons of equity. The question of the scale of harm was a corollary of that question; major harm required major compensation, except for possibilities of reduction taking into account the circumstances and situations of the States concerned.

20. The problem of the "global commons" was closely linked to that of protection of the environment and was of major concern to the international community. It was connected to international norms agreed upon in a multilateral context and was already under consideration in other international bodies concerned with formulating instruments on various aspects of the environment. The Commission was not the appropriate body to carry out such a study because it was liable to be overtaken by other more specialized bodies; at best, because of its importance, the topic could be included on the Commission's long-term programme.

21. His delegation was glad that the Commission had accelerated its work on part 2 of the topic of "Relations between States and international organizations" and hoped that work on the topic could be completed before the end of the new Commission's mandate. His delegation supported the principle and formulation of the articles proposed in the fifth and sixth reports of the Special Rapporteur, which had been sent to the Drafting Committee at the Commission's forty-third session. The Special Rapporteur had largely drawn on the corresponding provisions of the Convention.

22. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries, said they attached great importance to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", because there was a growing realization of the need for a legal instrument in that field, dealing most specifically with transboundary environmental harm. The objective of the current drafting exercise was both to prevent damage and provide reparation and to agree on a framework for guaranteeing that innocent victims were protected from transboundary harm and promptly compensated for damage caused.

23. The Stockholm Declaration on the Human Environment contained two basic principles on the topic: principle 21, which provided that States had the sovereign right to exploit their own resources pursuant to their own environmental policies, but also the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; and principle 22, which urged States to cooperate to develop further the international law regarding liability and compensation for the victims of

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pollution and other environmental damage. It was against that background that the Commission and the Committee should view the task of progressive development of the international law on the topic.

24. Turning to the draft articles, he said that the Nordic countries favoured a binding framework convention, with the option of treating some parts of the topic in the form of guidelines or recommendations, perhaps with annexes on particular issues. However, the final decision on the status and format of the draft articles would have to be taken by the Committee. They agreed that the word "activities" should replace "acts" in the title, which would in any event have to be simplified.

25. The scope of the topic should include both activities involving risk and activities with harmful effects. With regard to risk, general objective criteria were preferable to a list of dangerous substances, for the reasons given by the Commission. If there was to be a list, it should not be exhaustive. A clearer definition of harm than the one contained in article 2 (g) was needed so that States could assess the extent of their duty to pay compensation. As a minimum, compensation should be made for the cost of measures taken by the affected State to mitigate the harm or restore the environment to its former state. The Ad Hoc Working Group of Legal and Technical Experts convened by the United Nations Environment Programme to work on a protocol on liability and compensation for damage resulting from the transboundary movements and disposal of hazardous wastes had proposed a list of the kind of losses which should be covered by the concept of damage; the list might help the Commission in its future deliberations.

26. There was a clear need to include provisions on the prevention of transboundary harm, for preventive measures must first come into play when countering such harm. In fact, the thrust of international cooperation was currently on preventive measures and, happily, the principle was manifested clearly in the draft articles. It was argued in some quarters that prevention related mainly to risk activities, but it was also relevant to the containment of the effects of harmful activities and accidents.

27. As to liability itself, the state of law was that compensation was the responsibility primarily of the operator and that any liability of the State was residual. The Nordic countries reiterated their wish for the interrelationship between State-liability and civil-liability regimes to be clarified in the draft articles, starting from the need to protect the innocent victim and with the two types of regime complementing each other. States should be encouraged to use existing civil-liability regimes as well, and the draft articles should therefore include a recommendation for States to elaborate corresponding domestic or international regimes. Since the application of such regimes might prove inadequate in some instances, it must be established whether and under what circumstances the State of origin should have extended liability. Notwithstanding the subsidiary function of State liability, it seemed to be accepted that a claim asserting State liability did not necessarily require the exhaustion of civil-liability procedures. On the

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other hand, there would be merit in establishing coordinating mechanisms to encourage the affected State to introduce a "consolidated claim", or in introducing regulations concerning the "coexistence" of the international claim and actions in national courts.

28. The views of the members of the Commission clearly diverged on the whole topic, but the Special Rapporteur had identified some general trends. He had concluded that the majority felt that activities involving risk were predominately relevant to prevention and that activities with harmful effects related to liability and compensation; that most members were opposed to lists of dangerous activities and substances; and that the Commission was not yet ready to take a position on whether the "global commons" should be included in the topic. The last question was a difficult and important one, but it could hardly be treated under the present topic. Since the issues would take a long time to solve, the whole exercise would be delayed and the prospect of a successful conclusion might even be jeopardized.

29. The most serious threats to the global environment were caused not by ultra-hazardous activities but by everyday industrial and other activities which resulted in "creeping pollution". Such activities and their transboundary effects did not lend themselves to the clear-cut application of a regime of the kind under consideration. The distinction was between activities causing transboundary harm in a situation where the State of origin and the victims were clearly identifiable and activities where there was no causal link between an operator and a victim. The Nordic countries had no ready answers as to how the issue should be tackled. However, although the problems of creeping pollution were crucial, the current exercise must be kept within practical limits. Otherwise the result might be delay and the risk that States would be reluctant to accede to the international instrument.

30. The Stockholm Conference had taken place almost 20 years ago, the topic of international liability had been included in the Commission's agenda 13 years ago, and the United Nations Conference on Environment and Development would be held in 1992. In that context, it should be the Commission's aim to conclude the topic within the next term of office of its members, ideally completing the first reading of the draft articles at its next session.

31. Mr. CALERO RODRIGUES (Brazil) observed that at its forty-third session the Commission had done very little work on the topic "State responsibility", and there were no new elements requiring comment at the current stage. On the topic of international liability, however, the Commission had held in-depth discussions, and the current state of the topic warranted comment by the Committee. The Commission had established a reasonable foundation for the draft articles, and the basic premises on which it seemed to have reached an understanding were by and large acceptable. His delegation would not comment on three of the seven issues mentioned in paragraph 182 of the Commission's report (A/46/10): the title, because it was not very important; the nature of the topic, because that should be decided at a later stage; and harm to the global commons, because that should be the subject of a new topic.

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32. As to the remaining four issues, the scope of the topic seemed to have been satisfactorily defined, with a majority in favour of including both activities involving risk and activities producing harmful effects. The rules on prevention should obviously cover the concept of continuing activities, but it was not obvious that the same concept should be applied to the provisions on liability. Harm might be caused by isolated acts, and the general principles underlying the topic seemed to suggest that such acts should also give rise to liability. The Commission had given the question of harm its fundamental place in the topic: actual harm entailed liability, while prospective harm, or risk, created obligations of prevention. His delegation was glad that most of the members of the Commission did not favour the inclusion of a list of dangerous activities or substances, for such a list had no place in a general instrument and would be a source of problems.

33. Paragraph 222 of the report indicated that there was considerable support for the Special Rapporteur's proposals concerning principles important to the topic. They should indeed be developed in the draft articles, but there were other general points which could usefully form the basis for additional principles. One was the proposition that the innocent victim should not be left to bear the loss, and another was the valid principle of sic utere tuo ut alienum non laedas. Equally important was the principle of due diligence. The Commission was now in a good position to draft the chapter on principles.

34. On the question of prevention of transboundary harm, it must be remembered that not every activity which might cause such harm should necessarily be subject to the draft articles. Thresholds must be defined: the risk must have a certain magnitude and the possible harm a certain degree of gravity. Although it would not be easy to define the notion, the Commission could surely do it. An initial assessment must be made in order to determine whether an activity fell within the scope of the articles, and the Commission must decide whether any role in that assessment belonged to States which might be affected by the harm. From that point on, measures of prevention were in order and should range from unilateral measures taken by the State in which the activity was conducted to measures requiring the participation of other States. As to whether the obligations should be substantial or procedural, his delegation believed that firm substantive obligations should be set and that the procedural obligations should be further simplified and presented only as recommendations.

35. On the last of the seven issues, that of liability for transboundary harm, innocent victims should clearly be compensated, and in principle in full, but the specific elements of each situation must be taken into account, particularly the economic position of the States concerned. The dominant and welcome trend in the Commission was in support of a combined liability, with the private operator carrying primary liability and the State residual liability. The Commission had not reached a conclusion on the role to be assigned to the rules of civil liability. In his delegation's view it should not be a predominating one: compensation should not be sought under the draft articles if already obtained under civil-liability rules in the domestic

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legislation of the States concerned. The provisions on the point could be made more detailed, and in that regard the comments just made on behalf of the Nordic countries were very interesting.

36. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

37. Mr. MIKULKA (Czechoslovakia), speaking on general aspects of the topic of "international liability for injurious consequences arising out of acts not prohibited by international law", said that, although the Commission had been unable to submit even one part of the draft articles, it should not be concluded that its work had been ineffectual. The topic was a particularly complex and difficult one which involved legal and political questions that required careful consideration. The very fact that there had been a crystallization of views represented progress which would benefit the Commission's future work.

38. His delegation shared the view that there was no absolute principle in customary international law relating to a State's liability for reparations or compensation for material transboundary harm arising out of physical activities carried out in its territory or under its control. Objective liability always flowed from the provisions of special agreements. Moreover, examples of the concept of objective liability found in current treaty law between States were rare and exceptional. That position represented his country's preference in terms of the approach that should be adopted by the Commission in elaborating the draft articles and in its future work on the topic.

39. In view of the absence of precise rules in customary law concerning liability for transboundary harm, the approach should reflect the fact that the topic was concerned more with the progressive development of international law rather than with its codification. The Commission should therefore elaborate the principles relating to the subject, drawing inspiration from existing treaty law.

40. The question of the title of the topic was related to the problem of the Commission's mandate. Liability for harm arising out of acts of the State not prohibited by international law and international liability for injurious consequences arising out of activities not prohibited by international law were two different concepts. The concept of acts not prohibited by international law, or lawful acts, was the opposite of the concept of unlawful acts. However, both unlawful and lawful acts involved the State as the author of such acts and as the actor to which the consequences of its own conduct were directly attributable. The concept of acts not prohibited by international law therefore recalled the situations mentioned in the draft articles on State responsibility under the heading "Circumstances precluding wrongfulness". The Commission had agreed that the term "acts" in the English title of the topic should be replaced by "activities", which covered both activities of the State and activities carried out by entities other than the State.

(Mr. Mikulka, Czechoslovakia)

41. With regard to the principle of reparation, the Commission had supported a combination of approaches whereby the objective liability of the State for activities carried out by it or under its authority would be combined with a residual liability for harm caused by the activities of private operators where reparations could not be obtained on the basis of the civil liability of such operators. His delegation had no objection to the modification of the topic of the title in English.

42. Turning to the question of the nature of the instrument, he said that whether or not the instrument was to be of a binding character depended largely on its future content. The draft articles should, however, be envisaged as an instrument of a residual nature within the framework of which individual regimes could be established under bilateral or multilateral agreements.

43. The problem of cooperation and prevention, to which the Commission attached special importance, and the problem of compensation for harm were two independent questions. The duty to repair transboundary harm could in no way be linked to the obligation of a State in the area of cooperation or prevention. If that were so, the topic would be indistinguishable from that of State responsibility. His delegation shared the view that liability for repairing transboundary harm arising out of acts not prohibited by international law should be based on the maxim sic utere tuo ut alienum non laedas and on the principle of equity whereby the innocent victim should not be left to bear the loss alone.

44. The problem of harm to the "global commons" was a serious one with universal consequences. It was, however, quite distinct from the original topic and should therefore not be included in the draft articles. The Commission could return to the question, as a separate topic at a later stage.

45. With regard to the other topics in the Commission's programme of work, his delegation hoped that progress would be made at the Commission's forty-fourth session on the important topic "State responsibility".

46. On the topic "Relations between States and international organizations", the Commission should re-examine its purpose in considering the topic in view of the problems encountered with regard to the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

47. His delegation saw no urgent need for the inclusion of a new topic in the Commission's programme of work. In its new quinquennium, the Commission should concentrate on completing the various sets of draft articles in its current programme of work. None of the topics in the proposed new list seemed particularly appropriate for inclusion in the programme of work. Many were ambiguous while others could more properly be dealt with in bodies other than the Commission. The process of codification of the major topics of international law was drawing to an end and the new needs of the international

(Mr. Mikulka, Czechoslovakia)

community lay in the area of the progressive development of international law in fields in which State practice had not yet established fixed rules. The choice of new topics should only be made after a careful analysis of the needs of the international community.

48. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the subject of State responsibility was one of the crucial chapters of international law which still remained to be codified and the Nordic countries wished to see its codification move forward in a speedy and structured manner. It was therefore regrettable that the Commission had not considered the third report of the Special Rapporteur. Consequently, it would be inappropriate for the Committee to comment on the report, thereby reversing the roles of the Commission and the Sixth Committee. He wished to state, nevertheless, that the report was a crucial one which touched on probably the most difficult aspect of the whole topic, namely, the scope of a State's right to take self-enforcing measures in order to redress an internationally wrongful act and to obtain guarantees of non-repetition. The Nordic countries urged the new Commission to embark on a thorough consideration of the report as well as of the topic as a whole during its next and following sessions.

49. Turning to the programme and working methods of the Commission, he noted with satisfaction that the Commission had presented its draft articles on the topic "Jurisdictional immunities of States and their property". It was now time for the Commission to focus attention on the other items on its agenda, particularly the three interrelated topics on State responsibility, which it should seek to complete in its next quinquennium. The three topics should be considered in parallel to enable the Sixth Committee to evaluate the entire field of State responsibility. Their completion during the United Nations Decade of International Law would represent a major contribution to the strengthening of the international legal order. In those circumstances, the inclusion of new items in its agenda would distract the Commission from completing the draft articles on the entire field of State responsibility. Moreover, the new topics listed in paragraph 330 of the Commission's report (A/46/10) did not seem apt for the codification efforts of the Commission. The proposed topic on the legal effects of resolutions of the United Nations, for example, would be an academic exercise in view of the dynamic evolution of the United Nations itself. Other topics, such as "international commissions of inquiry (fact-finding)", and "the law of confined international groundwaters" were already being dealt with in existing forums, including the International Law Commission. On the other hand, it would be useful for the Commission to consider the topic of the legal effects to be given to reservations and objections to reservations to multilateral conventions.

50. Turning to the future working methods of the Commission, he said that the piecemeal approach adopted in the past should be abandoned in principle and that the Committee should require that draft articles submitted to it for comments should be presented in such a way that the overall picture of the problem was clear and sufficiently substantive to permit meaningful debate. Future reports of the Commission should identify those issues on which the guidance of the Sixth Committee was required.

51. Mr. CRAWFORD (Australia), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that, in view of the submission of the draft articles by the Special Rapporteur and the Commission's extensive discussions, it was time for the Commission to reach some firm conclusions, especially since many other bodies were grappling with the same issue in particular contexts and were looking for principled guidance. While the issue of damage to the "global commons" should be addressed by the Commission, it should be treated as a separate topic.

52. Turning to the specific matters discussed by the Commission at its forty-third session, he said that, while his delegation supported the change in the title of the topic, it was important not to lose sight of the most important and difficult part of the exercise, which was reparation and compensation for injury. It was true that in particular forums States were understandably reluctant to commit themselves to liability. But that was even more reason why the Commission should address the issue directly and from first principles. It should take as its general starting-point the proposition that an innocent victim should not be left without a remedy and it followed that the State from which transboundary harm originated was the international actor which was primarily responsible. That did not mean that it was exclusively liable or that it could not meet its liability by establishing suitable mechanisms of recourse so that it was not the State itself that paid for any harm. It must be the State, however, against which another injured State and its citizens were able ultimately to look for a remedy. The Special Rapporteur had noted that a combination of civil liability and State liability had attracted support. According to that approach, compensation was the responsibility of the operator, under the principle of civil liability, with residual liability being assigned to the State. That approach corresponded to that of a number of the existing conventions governing specific activities. However, while that might be a correct description of the practical operation of a number of civil liability and compensation conventions, it was not a correct analysis of the basic legal position. States were free to enter into agreements under which such compensation would be provided in whole or in part by the operator through a civil liability regime, but that did not alter the basic proposition that a State was liable to provide full compensation for damage caused to other States or their citizens by activities within its jurisdiction or control. Full compensation might not be provided under such agreements for a variety of reasons, including that the agreement provided for limitations of or exonerations from liability. It was therefore wrong to equate State liability with a requirement that the State itself bear the full financial burden of any compensation payment. A State should ensure through its regulatory system that activities were carried out in a way that would ensure that private operators had funds available to cover any compensation payment that the State would otherwise be obliged to meet.

53. The Commission's report also recorded the view that strict liability of States could not be extended to cover activities that were "essentially private" (para. 239). However, if the liability of a State to provide

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compensation arose from its obligation not to allow activities within its jurisdiction or control to harm other States or the "global commons", then the distinction between "private" and "State" activities had limited validity.

54. Turning to the future work programme of the Commission, he said that, since the establishment of the International Law Commission in 1947, one of the lessons of the experience of law reform agencies and commissions had been the phenomenon of the "second generation" problem. In their first phase, such bodies had a natural agenda of items which everyone agreed should be taken up. That had been true of the Commission, with its fundamental contribution to, inter alia, the law of the sea and the law of treaties. "Second generation" topics, however, tended to be more difficult, controversial, and less obviously useful. They were often interdisciplinary and technological changes had cut across both the established categories of the law and the work of other agencies.

55. The Commission had not yet completed the "first generation" of international topics, since it was still working on such fundamental topics as State responsibility, international liability for injurious consequences of lawful activities, and the law of the non-navigational uses of international watercourses. The Commission should give priority in its next term to the completion of such topics. The experience with the "second generation" of projects also suggested that a slight modification in the Commission's methods of work was required.

56. In the case of some of the topics suggested by the Commission as possible new areas of work, it might be useful for the Commission or a small working group thereof to undertake a provisional preliminary study in order to give a clearer idea of what would be involved in the project, of what a set of draft articles on the topic might look like, and of how it might relate to other texts or the work of other agencies. However, the eventual outcome of consideration by the Commission of the 12 listed items was mostly unclear, and his delegation could not agree to its taking them up without some preliminary study, even in the case of the "global commons", which his delegation did think should be taken up by the Commission. There was a serious question what such a project might look like, what it might contribute to the corpus juris and how its provisions might relate to other texts dealing with the "global commons". The topic would be a good one for a preliminary study. Like other delegations, Australia doubted whether many of the listed topics would prove suitable, as some, like extradition, were better suited to bilateral or regional arrangements, and others, like the rights of national minorities, were obviously a matter for other agencies.

57. Sir Arthur WATTS (United Kingdom), referring first to the topic "State responsibility", said that the third report of the Special Rapporteur (A/CN.4/440 and Add.1) raised a number of important and difficult issues relating to the measures that could be taken by an injured State against a wrongdoing State. His delegation was therefore disappointed that the

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Commission had been unable to consider the report at the forty-third session, but hoped that the following year it would be able to give the topic renewed attention.

58. On the associated topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission's work had been thorough and wide-ranging. His delegation considered it the duty of the Sixth Committee to provide the Commission with some guidance on which aspects should be given priority in the light of the current needs of the international community. He agreed with the view expressed by the Swedish delegation earlier that it was too early to decide whether the fruits of the Commission's work should ultimately be adopted in a binding or non-binding form; that decision would depend on the ultimate content of the Commission's draft articles. The Commission should not feel that its work must lead to an outcome either wholly binding or wholly non-binding. Obligations which could be precisely defined might be given legally binding status, while those which were general and wide-ranging might more appropriately become guidelines.

59. The substance of the topic seemed to fall into two distinct parts: prevention of transboundary harm and compensation for such harm. The United Kingdom considered the development of preventive regimes to be the most valuable aspect of the Commission's work, for where damage to the environment or human health was concerned, prevention was always better than cure. The object should not of course be to prohibit otherwise lawful activities, but to regulate the manner of their operation so as to prevent or minimize the risk of transboundary harm and to require that information and consultation be offered to the affected State in good time. To that end, the Commission could either aim for precisely defined legal obligations in relation to specific hazardous substances and activities, or it could promote the development of broader preventive regimes by providing a framework for further instruments or ad hoc negotiations. The Commission should be clear as to which it wanted before the material went to the Drafting Committee.

60. His delegation would like to see further consideration of the consequences of non-compliance by the State of origin with preventive obligations, and saw no reason why such non-compliance should not give rise to legal responsibility in the normal way.

61. Where transboundary harm occurred which could not be attributed to any breach of legal obligations on the part of the State of origin, liability should rest with the operator, for States could not assume financial liability vis-à-vis non-nationals for all acts by private entities and individuals under their jurisdiction. That would not accord with the "polluter pays" principle, to which the United Kingdom attached importance. States could, however, realistically institute effective liability systems in their domestic law and ensure that recourse against the operator was available to non-nationals and other States on a non-discriminatory basis. State responsibility should be engaged for failure by the State to provide adequate civil remedies. The

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Commission might help States in that respect by, for example, drafting model clauses on civil liability which States could consider adopting in their domestic law. States should also be encouraged to strengthen their international arrangements for reciprocal recognition of civil jurisdiction and enforcement of civil judgements. Strict or residual liability should not be imposed on States not in breach of obligation, unless by virtue of other instruments designed to deal with specific problems.

62. His delegation was not convinced that there was any sound basis for treating the topic as a subject outside the application of the normal rules of State responsibility; its essential relationship to those rules had not been satisfactorily resolved in the Commission's work, and yet it was one of the most important of the fundamental issues still needing to be resolved before detailed drafting work could usefully resume. Lastly, he felt that the title of the item did not necessarily fit the content and that the Commission might like to consider the alternative title of "International responsibility for transboundary harm".

63. Mr. Al-BAHARNA (Bahrain), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that his delegation had noted with satisfaction the efforts to re-evaluate the development of the topic in the Commission and the opportunities provided to members to reconsider their positions (A/46/10, para. 182). On the question of the general issues discussed in paragraphs 183 to 197, his delegation was mindful of the difficulty of drafting an instrument where consensus was lacking, particularly on the content and structure of the proposed instrument. Instead of reopening issues already examined, the Commission might wish to take a bolder step and proceed, as suggested in paragraph 196, to have the Drafting Committee examine the first 10 articles so as to obtain a more concrete consensus. Although the Commission's task was mostly to select principles relating to the environment, the selection of norms ought not to be limited to environmental matters but should extend to all activities of individuals and organizations that caused or might cause transboundary harm. Moreover, the existence of various multilateral treaties on different aspects of liability for injurious consequences highlighted the importance of the work on the current topic. The treaty or convention concluded thereunder would provide essential principles and rules on the question of liability and would thereby create a general institutional charter governing all aspects of international liability for injurious consequences arising in the stated circumstances.

64. His delegation saw the title of the topic as too narrowly defined and believed it should be more broadly stated so as to accommodate both "acts" and "activities". As to whether the envisaged instrument should be binding or non-binding, the task of codification and the progressive development of international law would be best served by formulating rules in the context of a convention.

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65. With respect to the scope of the instrument, it ought to deal with activities involving risk as well as those causing transboundary harm, but his delegation believed that a certain reasonable separation was inevitable, given the fact that actual harm caused would have to be viewed more seriously than potential harm. It viewed with favour the proposals made in paragraph 217.

66. A greater degree of consensus had emerged on the general principles (paras. 222 to 226) that would constitute the core of the instrument. As the principle of prevention formulated by the Commission involved the mitigation of harm actually incurred in the territory of a State, it was clear that as formulated by the Commission the proposition was much broader than the conventional idea of "prevention", for the Commission had thought fit to include under that principle what was actually a duty resulting from the consequences of harm caused.

67. With respect to reparation, his delegation was in favour of a combination of civil and State liability. Civil liability would lie directly with a private operator and the State might be only indirectly involved.

68. The various principles mentioned in paragraphs 225 and 226 were essential to any regime of liability, but their identification was only a preliminary step; the substance of the work would involve the formulation of a scheme for the interplay of those principles, and of subsidiary rules to qualify and limit the scope of their application. The Commission would also need to adopt certain policy guidelines, especially to balance the interests of various groups and States.

69. His delegation believed that the notion of appropriate preventive measures was important and should be included, not only because it supplied reasonable checks and might reduce the scale of transboundary harm, but also because it gave legal substance to the concept of risk. If that concept was admitted as being relevant to the topic, a regime lacking in preventive measures would be inherently weak. With respect to the question of the threshold over and above which the affected State could demand prohibition of an activity, the Commission should consider merely referring to harm which was unreasonable in scale or intensity, or even dispense with any reference to a quantitative or qualitative test.

70. With respect to the divergent opinions in the Commission on compensation and liability, his delegation was not entirely convinced that primary liability should be placed upon the private operator. The fundamental question was whether there was good reason to depart from the established rule, which placed strict liability on the State in whose territory the offending activities were conducted. His delegation was of the opinion that the basic principle confirmed in the Trail Smelter arbitration should be adhered to. As the State exercised absolute authority over all lawful private and public sector activities in its territory, it was reasonable to place primary international liability on the State and subsidiary liability on the

(Mr. Al-Baharna, Bahrain)

operator. At any rate, "to leave it to States to make what provisions they saw fit for the operator to be made liable for transboundary harm", as suggested in paragraph 246, meant simply preserving the status quo.

71. With respect to compensation for harm caused, his delegation believed that it should be payable for all appreciable transboundary harm, regardless of whether or not it resulted from activity known to involve risk. As far as the amount of compensation was concerned, the sum should be negotiable, but only where the offending State admitted liability and accented the principle of compensation. Otherwise, the adoption of judicial or quasi-judicial procedures might be the optimal solution.

72. While his delegation was convinced of the need to avoid harm to the "global commons", it considered the issue inappropriate for inclusion in the current topic. The Commission would need more scientific studies to examine all aspects of harm caused to the "global commons" by such activities. As such studies were not yet available, it might be inadvisable to formulate detailed rules on matters that were still in embryonic states of investigation and research. For the time being, the general rules and principles contained in the Stockholm Declaration, the Basel Convention and the Montreal Protocol might suffice.

73. Mr. NTSAMA (Cameroon), referring to the topic "Jurisdictional immunities of States and their property", said there was no doubt that the implementation of the theory of State immunity had been uneven. One country had observed that while the 1961 Vienna Convention on Diplomatic Relations provided for the jurisdictional immunity of diplomatic agents, it made no such provision for that of diplomatic missions and hence for that of accrediting States. According to Cameroon, the explanation for that was simple: the State by definition enjoyed jurisdictional immunity and did not need to have it conferred by an international convention. The International Law Commission had emphasized that fact in its comment to article 18, wherever it referred to the principle par in parem imperium non habet and observed that no sovereign State could exercise its sovereign power over another equally sovereign State. Necessarily, then, no measure of execution or constraint could be taken by the authorities of one State against another State or its property.

74. Since the draft articles dealt with both jurisdictional immunity and immunity from execution, it might be appropriate to change the title accordingly.

75. In connection with part III, "Proceedings in which State immunity cannot be invoked", his delegation considered that the primary criterion for identifying such proceedings was the distinction between acts and behaviour by the State exercising governmental authority (jus imperium) and functioning as an economic agency. While commercial transactions might well not be subject to jurisdictional immunity, it was important not to include in that category transactions which, although commercial, fell within the realm of activities in which the State exercised governmental authority, such as the purchase of premises for use as a chancellery or diplomatic residence.

(Mr. Ntsama, Cameroon)

76. In his delegation's view, article 11, on contracts of employment, was liable to lead to uncertainties in that it would be difficult to determine whether an employee had been recruited to perform functions closely related to the exercise of governmental authority. Would it be acceptable, for example, for employees who were nationals of the State of the forum to exercise their right to strike in an embassy? In such cases, he believed, diplomatic solutions were surely better than judicial settlements.

77. His delegation welcomed the conclusions reached by the Commission in respect of part IV, "State immunity from measures of constraint in connection with proceedings before a court". It did, however, consider that paragraph 1 of article 18 should be amended to begin with the following wording: "No measures of constraint, whether interim, interlocutory, conservatory or executory, such as attachment, arrest and execution, against property of a State may be taken ..."

78. Turning to the topic "The law of the non-navigational uses of international watercourses", he welcomed the innovative nature of the draft articles provisionally adopted by the Commission on first reading, but queried the definition provided in article 2 (b) of a "watercourse": such a definition would entail a comprehensive review of existing maps, which did not indicate groundwater. Developing countries in particular did not have the means to revise their maps accordingly, and a definition which included groundwater might have the effect of making many watercourses "international", with incalculable consequences.

79. Referring in conclusion to the draft Code of crimes against the peace and security of mankind, he said there was a danger that the draft Code could become too generalized, and he therefore proposed that it should be confined to crimes already recognized by the international community as being crimes against mankind: the entry into force and the implementation of such an instrument would be closely linked to consensus on its scope. His delegation was not in principle opposed to the establishment of an international criminal court, without prejudice to existing arrangements. The Code itself should be sufficiently selective in enumerating crimes against the peace and security of mankind to ensure its effectiveness, and the penalties provided should be commensurate with the offences.

80. Mr. MOMTAZ (Islamic Republic of Iran), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that his delegation took a favourable view of the Special Rapporteur's proposal for an overall review of the International Law Commission's work on the topic, particularly in the light of the fact that, since 1988, the Drafting Committee had not been in a position to consider any of the articles submitted to it by the Commission. For that reason, the Commission's position on certain issues remained unclear. In the meantime, treaty law on international liability had been evolving rapidly, a circumstance which the Commission could not overlook. It would therefore seem

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timely to give delegations the opportunity to make their views known on the underlying issues and to provide the Commission with guidelines for its future work.

81. His delegation favoured a framework agreement which would allow arrangements to be made at the bilateral and regional levels while ensuring the necessary flexibility. However, it should not be overlooked that the economic and financial situation of States might greatly influence their attitude to the provisions adopted: it would be difficult, if not impossible, to try to apply the same standards for liability and fixing of compensation without taking such circumstances into account.

82. It had been asked whether the Commission should confine itself to considering the injurious consequences of activities which caused transboundary harm or whether it should also concern itself with activities involving risk of such harm. The main reason for the inclusion of the topic in the Commission's agenda was the concern to compensate the victims of harm caused by activities carried out in places under the jurisdiction of a State other than that in which the victim resided. Priority should therefore be given to reparation for actual damage.

83. To extend the scope of application of the draft articles to activities involving risk of harm would, in his delegation's view, render the task of the Commission extremely complex. Since all human activities were accompanied by some element of risk, the Commission should concentrate on defining those activities which were regarded as dangerous.

84. To tackle the latter question would inevitably lead the Commission to arrive at more substantive preventive measures which might well go beyond the mandate initially entrusted to it. The obligations of States in respect of reparation should be carefully distinguished from their obligations in connection with prevention. As international law stood, each State was required to take all necessary precautions to prevent the harmful consequences which might result from dangerous activities. To facilitate that task and ensure a measure of uniformity, it would be best to proceed at the regional level, an approach which offered the advantage of taking into account the specific features of the States concerned.

85. With regard to the question whether any future instrument should cover harm caused to the "global commons", his delegation felt that, despite the absence of an international body responsible for the global environment, the principle affirmed in customary and treaty law, in the 1972 Stockholm Declaration and in various General Assembly resolutions that States were obliged to ensure that activities carried on within their jurisdiction or under their control did not cause harm in regions outside their jurisdiction was sufficiently well established for it to be worthwhile to invite the Commission to consider the issue and make proposals, in the interests of developing international law in respect of liability and compensation for harm caused to the "global commons".

(Mr. Momtaz, Islamic Republic of Iran)

86. Secondly, it would be appropriate to stress that the object of the exercise should be to find general rules for compensation. In that context, it was natural to invoke the liability of the State of origin of a harmful activity: the primary liability of such a State was a function of its sovereignty. However, in practice most of the activities concerned were carried out by private operators, and under international law the obligations of the sovereign territorial State were confined to the adoption of legislative and administrative provisions aimed at limiting the risk of harm and ensuring that those provisions were complied with.

87. For that reason, primary liability lay with the operator in such cases. States must therefore ensure that their domestic law provided remedies to enable victims to obtain redress in their courts or to obtain prompt and adequate compensation by other means. The principle of equality of treatment of victims, whatever their nationality or place of residence, would ensure that the system of civil liability of the operator was upheld.

88. There were, however, circumstances in which the civil liability of the operator was not in itself sufficient to safeguard the interests of the victim. The operator might, for example, claim insolvency on the grounds of the scale of the compensation, or it might prove difficult, if not impossible, to identify the perpetrator. That was the main reason for invoking the concept of liability on the part of the State of origin as a last resort, an approach with which his delegation found itself in agreement. In that connection, reference had been made to the residual liability of such a State, but it should not be overlooked that the specific circumstances in developing countries sometimes were such that, due to lack of financial resources, they might not be in a position to compensate the victims. As suggested by the Special Rapporteur, it might be appropriate to establish a special fund for such purposes: financing of the fund would be provided by States according to a scale which reflected their economic status.

89. In conclusion, he said that he hoped that the Commission would, in the next five-year period, accord greater priority to a topic which had, due to the other issues claiming its attention, been so far somewhat neglected.

The meeting rose at 12.55 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
33rd meeting
held on
Thursday, 7 November 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

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later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)

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91-57214 5303S (E)

Distr. GENERAL
A/C.6/46/SR.33
22 November 1991
ENGLISH
ORIGINAL: FRENCH

The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. TUERK (Austria), referring to chapter V of the report of the International Law Commission (A/46/10), entitled "International liability for injurious consequences arising out of acts not prohibited by international law", said he regretted that the Drafting Committee had not been able to consider any of the draft articles referred to it since 1988 "due to other priorities" (ibid., para. 182). He pointed out that 13 years had passed since the Commission had included the topic in its programme of work. As the time factor was a key element for the effectiveness of any codification exercise, the Commission should make a sustained effort to achieve further progress without undue delay. The Commission had devoted only two meetings to the topic in 1991. Moreover, as indicated in its report (ibid.), despite the seven reports already submitted by the Special Rapporteur, "the position of the Commission was not entirely clear on some important issues".

2. Austria attached particular importance to that topic, as it raised many important problems in connection with the development of international environmental law.

3. The Commission, at its forty-third session, had dealt with the legal nature of a possible instrument. In his delegation's view, if a binding instrument was to be elaborated, that instrument could only be a framework convention containing provisions of a residual character. It would also seem more appropriate to leave the establishment of specific regimes to bilateral or other multilateral agreements, which could draw inspiration from the principles embodied in a framework convention.

4. It might be asked whether elaborating one single regime of liability was not too ambitious a goal. A sector-by-sector approach leading to the adoption of separate legal instruments that took into account the various factual and legal situations might be more realistic. A single regime, especially one concerning strict liability, which might apply to future as yet unknown circumstances, would amount to an open-ended obligation by States. Thus it might be preferable to take a different approach, distinguishing between hazardous activities on the one hand and harmful activities on the other.

5. His delegation was pleased to note that the majority of the members of the Commission had explicitly supported the principle that the innocent victim should not be left to bear the loss alone. It favoured a system of combined liability of the private operator and the State, in which the operator carried primary liability and the State residual liability. The Commission should draw inspiration in that regard from the ongoing work in the International Atomic Energy Agency on the question of liability for nuclear damage.

(Mr. Tuerk, Austria)

6. With regard to chapter VI of the report, entitled "Relations between States and international organizations", his delegation felt that the topic was not a priority but that, in considering it, the Commission would have to take into account the opinions expressed by the host countries if the end-product was to be widely accepted by that group of States; that had not been the case with the Vienna Convention of 1975 relating to the first part of the topic.

7. Concerning chapter VII of the report, the Commission had been dealing with the question of State responsibility for 29 years and nothing indicated that a conclusion to its work on that topic was near. State responsibility was certainly one of the core problems of international law, but there was no justification for the Commission spending several decades on it. The Commission should submit the end-product of its work to the international community within the next term of office of its members. Should it reach the conclusion that the question was not yet ripe for codification, the Sixth Committee might in such case decide to suspend consideration of it until changing circumstances offered better prospects for completing the exercise.

8. His delegation had been pleased to note the improvements made in the Commission's working methods in recent years. Further steps could be considered, such as splitting the annual session into two parts and holding meetings of the Drafting Committee between the regular sessions. The financial implications of such measures would probably not be very significant if one part of a split session were held in New York. The traditional system of Special Rapporteurs might also be reformed: the latter could be assisted by two or three of their colleagues so as to reflect a wider range of views at the stage of preparing the report, thereby facilitating its consideration by the Commission. States might then be better disposed to accept the texts emerging from the Commission.

9. His delegation felt that considerable caution should be exercised in adding new items to the Commission's programme of work. The work in progress should first be completed and there would probably be room for only one new topic during the next quinquennium. A time-limit should also be set for the consideration of matters referred to the Commission. That time-limit might coincide with the term of office of its members. If consideration of a topic could not be completed within that time, the Sixth Committee would then have to decide whether it was suitable for codification or whether its further consideration should be postponed to more auspicious times. Some of the new topics proposed for consideration by the Commission (ibid., para. 330), particularly those concerning human rights or economic questions, should be dealt with by other specialized bodies. On the other hand, the international legal aspects of the protection of the environment was a worthy topic on which the Commission should focus its attention in the years to come.

(Mr. Tuerk, Austria)

10. Austria was pleased to have been able to contribute to the organization of the International Law Seminar dedicated to the memory of Paul Reuter. The young Austrian lawyers given the opportunity to participate in the Seminar had acquired experience that had proved most useful thereafter for their work in the Austrian Foreign Ministry and in the Sixth Committee.

11. His Government wished to host a United Nations codification conference at Vienna on the question of jurisdictional immunities of States and their property.

12. Mr. NASIER (Indonesia) welcomed the Commission's adoption of the final text of draft articles on jurisdictional immunities of States and their property and its recommendation to convene a conference of plenipotentiaries with a view to concluding a convention that would go a long way towards resolving the practical difficulties arising from the commercial activities of States by clarifying the law of jurisdictional immunities on that point of great importance, particularly for the developing countries. Article 2 (A/46/10, para. 28) proposed a definition of commercial transactions divided into three categories and rightly broadened the definition of the term "State" to include the constituent units of a federal State. The definitions should be further clarified to resolve the issue of whether the nature and/or purpose of the contract was to be considered when deciding whether the commercial transaction was an exception to the rule of sovereign immunity. As more and more States were engaging in commercial activities, Governments had established separate entities endowed with legal personality. In the event of a dispute, State immunity should remain intact and the claimant State should be able to bring an action only against the State enterprise. With regard to the proposed text of article 11 bis (A/CN.4/431, para. 21), the secretariat of the Asian-African Legal Consultative Comittee had clarified the question of immunity in its 1991 report by stating that article 11 bis should be interpreted as meaning that the domestic courts of the forum State had the right to bring an action against the State enterprise but not against the State itself.

13. Indonesia was particularly interested in the Commission's work in the field of the law of the non-navigational uses of international watercourses. The Special Rapporteur's seventh report (A/CN.4/436) had dealt mainly with the question of the definition of the term "international watercourse". The Commission had been far-sighted and practical in including groundwater within that definition. As to whether the term "watercourse" should be defined as a "system" of waters, his delegation felt that the "system" concept, as clarified in paragraph 73 of the Special Rapporteur's seventh report, was acceptable.

14. On the topic of the draft Code of Crimes against the Peace and Security of Mankind, the Commission had dealt with two main issues, namely, the applicable penalties and the establishment of international criminal jurisdiction. The draft Code must specify penalties for each of the crimes

(Mr. Nasier, Indonesia)

listed. As there was a wide divergence of State practice regarding capital punishment or life imprisonment, it was unlikely that States would be subjected to the provisions of draft article Z. The question remained, why would a State surrender its jurisdiction to an international court or tribunal if the crime in question would attract a heavier or lighter penalty in its own national courts. With regard to the proposals for the establishment of an international criminal jurisdiction, his delegation considered that, for the time being, national criminal courts might well be the most effective and appropriate courts to try international crimes, including drug trafficking, murder and torture.

15. Mr. PUISSOCHET (France) said, with reference to relations between States and international organizations, that it was doubtful whether a common regime could be defined for all international intergovernmental organizations, or at least for most of them. Trying to cover the institutions of the United Nations system, similar organizations having world-wide competence, and even such regional organizations as those covered by Chapter VIII of the Charter of the United Nations, was being too ambitious.

16. The discussions that had taken place on the subjects of the confidentiality of the archives of such organizations and exemptions from taxes and Customs duties were unquestionably of interest, especially when they highlighted the need to take account of new methods of transmitting and recording information, for example by computer technology or satellites. But more than anything else, they showed the great difficulty, if not the impossibility, of formulating common rules for organizations whose activities and needs were very different. The precise privileges and immunities appropriate to the aims and powers of each organization should be determined case by case. France was very firmly committed to that sort of functional approach. It would doubtless be said that the aim was only to formulate "minimal" rules applicable to all international organizations, rules that would then be supplemented case by case. Assuming that such an approach was realistic, it would be hard to say that the draft discussed by the International Law Commission could be described as "minimal". All in all, while the value of the work done by the Commission and its Special Rapporteur for the topic had to be acknowledged, the possibility of supplementing existing agreements between States and international organizations with a body of common rules could only be envisaged with the greatest caution.

17. Turning to chapter III of the report (A/46/10), he noted, with reference to the question of defining an international watercourse, that the very wide-ranging concept in the two definitions initially suggested by the Special Rapporteur went beyond the general practice of States in that area. Even if some watercourse agreements embraced the whole or the greater part of a hydrographic basin, that was not generally the case. It was very rare for groundwater to be taken specifically into account; in practice, the work of river commissions only occasionally involved groundwater, and then it was when the groundwater was in direct and continuous contact with the river. The idea

(Mr. Puissochet, France)

that waters must at least flow into a common terminus, if they were to be considered to be part of an "international watercourse" in the sense of the draft, seemed to be absolutely justified. As for tributaries, they should only be considered to be part of an international watercourse if they themselves crossed boundaries, and their effect on the main watercourse could be taken into consideration when investigating sources of pollution, for example. On the other hand, subjecting all tributaries to the same legal regime as the main international watercourse could result, in some cases, in a considerable and unjustified increase in the obligations to be placed on the States in which they were situated. A restricted definition seemed therefore to be more in keeping both with customary law and with the logic of a framework convention which left it to individual watercourse agreements to incorporate more extensive definitions where they were justified. Such a definition should be restricted to the main watercourse, from its source to its mouth, and waters directly and continuously associated with it.

18. With regard to article 27 (ibid., p. 187), it was questionable whether it could be taken as a principle that every watercourse needed regulation and that regulation itself could only be managed jointly by the watercourse States. The regulation of flows could, on the face of it, be governed by the general provisions on watercourse agreements (arts. 3 and 4), regular exchange of data and information (art. 9) and notification of planned measures (arts. 11 to 19). The only obligation that seemed to be justified was the obligation to notify other watercourse States and to agree to consultations when there might be repercussions on other States.

19. Because of their particular characteristics, rivers could not all be subjected to a uniform regime if it was too detailed or restrictive. So the most suitable solution appeared to be a framework convention. Such a convention would comprise a collection of articles reflecting the customary law applicable to the riparian States of a single watercourse, even in the absence of any conventional undertaking between those States, followed by one or more annexes offering more detailed model agreements or clauses which the riparian States of any given river could adopt or draw on for their negotiations, and examples of cooperation. The collection of articles composing the convention proper could deal with many of the subjects tackled in the current draft, for example, use of terms, watercourse agreements, notification, emergency situations and non-discrimination.

20. Whatever solution was adopted, it would have to be flexible enough to be adaptable to every situation and not try to impose in abstracto what could only be achieved by agreement and cooperation between the interested parties, the riparian States.

21. With regard to the draft articles on State responsibility, countermeasures could only be taken with due respect for the fundamental rules of international law (non-recourse to armed force, respect for human rights, respect for the inviolability of individuals and of premises protected under

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diplomatic law). So far as the latter was concerned, it might be asked if there was not already a "self-contained" regime, to use the Special Rapporteur's expression. With regard to the relevance of jus cogens, that concept, such as it appeared in the Vienna Convention on the Law of Treaties, prompted reservations. As for reprisals, they were only legitimate if there had really been a prior wrongful injurious act. A conviction in good faith that such an act had been committed could result in reactions and be taken into consideration in determining possible responsibility for those reactions, but that would not be a matter of reprisals in the legal meaning of the term. In conclusion, the Special Rapporteur's intention to pay particular attention to the fundamental problem of proportionality between countermeasures and the alleged wrongful act, and to try to express that principle more rigorously, was to be welcomed.

22. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he recalled that France had always expressed the strongest reservations about the possibility of codifying the topic, for two reasons. In the first place, it seemed essential to complete the draft articles on State responsibility first, so that the two regimes of responsibility and liability could be related one to the other; secondly, establishing machinery for absolute State liability for injurious consequences arising out of acts not prohibited by international law, even if that responsibility was only residual compared with the liability of the private operator involved, would be a significant development in international law which States were not ready to accept as a general rule, even if it appeared in particular conventional legal instruments.

23. In his seventh report (A/CN.4/437), the Special Rapporteur raised the question of the very title of the draft articles. It was fortunate that a thorough analysis had been made of the risk of internal contradiction inherent in formulating general norms for eliminating risks due to dangerous activities and maintaining the thesis of liability sine delicto, when the violation of such norms, if they existed, could constitute a basis for classical international responsibility. In the same way, paragraphs 27, 31 and 52 reported opinions favouring restrictive rules in respect of duties of prevention, and more flexible rules in the area of liability for risk, which could lead back to the classical concept of responsibility for failing to meet an obligation when injurious consequences resulted.

24. Considerations concerning the scope of application of the draft articles were very prominent among the questions of preventing injurious consequences due to harmful or dangerous activities. Note was taken of the particularly difficult legal problems of liability for activities that were both harmful and widespread, such as some types of atmospheric pollution from a number of sources.

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25. On the subject of principles, the Special Rapporteur had clearly outlined the considerable difficulties which would arise from a possible combination, in respect of the same injury, of the civil liability of the operator and the liability of the State. Legal traditions included a very wide range of principles of liability, including such concepts as that of "responsabilité pour risque du fait des choses" found in French law, which were being more and more frequently applied to environmental harm, inter alia, in cases with a transboundary element. Transboundary pollution was thus governed principally by international private law, international public law intervening only in order to harmonize private liability regimes and helping to resolve conflicts of laws or jurisdictions.

26. The protection of "global commons" was a matter of growing concern and formed the subject of a number of draft agreements still in process of negotiation or recently adopted. That being so, the codification of a general regime of international responsibility for global commons appeared difficult.

27. So far as the Commission's future work on the topic was concerned, there were only two lines of action which might prove fruitful at the present stage of development of international law. The first would be to limit the codification exercise to the obligation of vigilance of States in respect of harmful or dangerous activities while endeavouring to formulate certain very general obligations of prevention and non-discrimination to which the general rules of international responsibility of States would be applicable. The other would be to opt for a more long-term exercise, preliminary to any attempt at codification of reflecting on the whole question of liability for risk, its relationship with the overriding liability of the operator, its applicability to global commons, and a possible actio popularis for the protection of global commons. Since the general law of international liability did not seem to contain any clearly established element relative to those points, pioneering work would have to be done and with a view to proposing new rules to Governments.

28. The Commission's working methods called for two comments. First, it was clearly up to the Commission itself to adapt its own methods within the framework of its mandate and on the basis of the principle of self-organization. Second, some thought should be given to the possibility of the Commission's holding two separate sessions, both at Geneva. It was most important that the Commission should make known its ideas and preferences in the matter. It would also be essential to carry out a financial study to ensure that the present budgetary allocation would not be exceeded, possibly at the cost of a modest reduction in the overall duration of the sessions.

29. There were three comments to be made on the subject of the Commission's programme of work. First, priority should be given to the completion of topics on which the Commission had been engaged for some time, in particular that of State responsibility. Second, to the criteria proposed for the selection of items for inclusion in the future programme of work should be

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added that of the assured existence within the international community of the minimum political consensus necessary for the eventual success of the undertaking. Lastly, the Commission at its forty-fourth session could perhaps resume the consideration of possible topics for inclusion in its future programme of work on the basis of comments made in the Sixth Committee.

30. Mr. KAMPER (Netherlands) said that one of the first questions arising in connection with the topic of international liability for injurious consequences arising out of acts not prohibited by international law was that whether the topic dealt only with activities which were definitely lawful under international law or with activities which were not unlawful per se. The latter category of activities might or might not be lawful depending on the circumstances in which they took place and the degree of transboundary harm they might cause. The rather ambiguous nature of that second category of activities considerably complicated the formulation of the draft articles which were to govern them.

31. The separation between acts and consequences upon which the whole approach to the topic was based was artificial; in the real world, acts and their consequences could not be separated. In theory the topic could embrace any act not unlawful per se, but the successive Special Rapporteurs and the Commission had decided to limit the scope of the topic to activities entailing transboundary physical consequences of a harmful nature.

32. In his delegation's view, the topic should in principle include not only activities involving risk of causing transboundary harm ("activities involving risk"), but also activities which actually caused such harm ("activities with harmful effects"). It might perhaps be necessary in due course to develop some separate rules for each of those two categories.

33. His delegation considered that a certain threshold should be introduced with regard to the risk or harm created by the activities covered by the topic in order to avoid the inclusion of activities in respect of which no prevention or compensation was necessary.

34. A non-exhaustive list of activities or dangerous substances could be added to a general definition indicating what kind of activities or dangerous substances would be covered by the topic; the list could not, however, serve as a replacement for such a definition.

35. The inclusion of provisions designed to set limits to the freedom of action of States to carry out or to permit activities in their territory or under their jurisdiction or control, or to prevent activities involving risk or activities with harmful effects, could only be properly judged when it was clear whether the topic was to deal only with activities which were lawful under general international law or with activities which were not unlawful per se but might be unlawful under certain conditions. In the former case the provisions concerning prevention should be phrased in recommendatory terms and

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could only be made obligatory by way of progressive development of the law through their inclusion in an international agreement. In the latter case, the provisions would have to be obligatory.

36. In the light of the existing case law, in particular the arbitration decision in the Lake Lanoux case, his delegation shared the view that prior consent of the potentially affected State would not be required before the activity could be authorized.

37. The principle in draft article 6 concerning freedom of action and limits thereto was only in part inspired by principle 21 of the Stockholm Declaration; its main basis was the maxim sic utere tuo ut alienum non laedas, which stated the obvious and was thus somewhat useless. The real question was what the right of the other States implied in cases of transboundary harm caused by activities which were not unlawful per se.

38. As for the provisions on prevention in the sixth report of the Special Rapporteur (A/CN.4/528), which were couched in obligatory terms, they would be difficult to understand if the topic was to deal with activities which were definitely lawful under international law as well as those which were not unlawful per se.

39. On the subject of strict liability, his delegation shared the view that transboundary harm should in principle be fully compensated and that the States concerned must enter into negotiations to that effect. He found it difficult to understand on what legal grounds the State of origin would be entitled to ask for a reduction in the payment. The payment of full compensation was surely the price to be paid by the State of origin for being able to continue with an activity involving or having harmful effects.

40. Innocent victims should not be left to bear the loss alone. Compensation should be based on the liability of the State of origin, the civil liability of the operator or a combination of those two forms of liability. In order to invoke the liability of the State of origin, the prior exhaustion of local remedies should not be required. Combined liability could be envisaged, as in conventions concerning compensation for nuclear damage, which would provide for the primary liability of the operator of the activity and a subsidiary or supplementary liability of the State in whose territory and with whose knowledge the activity took place.

41. As to the nature of the instrument, an international convention could be envisaged, but a decision on the question could be left to a later stage.

42. Mr. Sandoval (Ecuador) took the Chair.

43. Mr. TOMUSCHAT (Germany) expressed the hope that, during the next five years, the Commission would take advantage of its shortened agenda to advance and perhaps even to finalize its work on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law.

44. Part One of the draft articles on State responsibility adopted in 1980 (A/35/10, part III.C) was generally deemed to provide a sound basis for the elaboration of rules on the consequences of responsibility. Nevertheless, it had also elicited a number of criticisms, in particular, because it did not openly address the question of fault and left unresolved the question of whether or not fault was a necessary element of State responsibility. The answer to that question would also have important repercussions on the treatment of liability for the injurious consequences of lawful acts; the larger the field of State responsibility, the narrower the scope of liability, and vice versa.

45. Many arguments militated in favour of reducing the role which fault could legitimately play in a system of State responsibility. A State which caused injury to another State should not be permitted to hide behind the lack of fault in order to escape compensation. Additionally, in practical terms, fault could be difficult to prove.

46. The lack of references to fault in Part One of the draft articles appeared to indicate that fault was a notion alien to the law of State responsibility. According to article 3 (ibid., p. 59), an internationally wrongful act of a State had only two elements, namely, conduct attributable to the State and conduct constituting a breach of an international obligation of the State. However, the question arose as to whether or not an element of fault entered into the breach of an international obligation. According to article 16 (ibid., p. 63), the reply to that question would tend to be negative. There was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation, regardless of whether the State had really been in a position to abide by its commitments. That impression was confirmed by article 20 (ibid., p. 64) dealing with obligations of conduct or means, by article 21, dealing with obligations of result, and even more explicitly by the Commission's commentary on those two articles (Yearbook of the International Law Commission 1977, vol. II (Part Two), pp. 16-17, para. (19), and pp. 29-30, para. (35)). As to article 23 on obligations of prevention, it provided that a breach of such obligations existed if the event which the State was bound to prevent occurred, notwithstanding the measures adopted by the State. No reference was made to the degree of vigilance observed by the State or to its material capacities to act so as to prevent the incident. Nevertheless, in its commentary, the Commission essentially stated that the obligation to prevent a given event did not constitute insurance against the occurrence of that event, regardless of any material possibility of the State to control the situation (Yearbook of the International Law Commission 1978, vol. II (Part Two), p. 82, para. 6). There was a clear discrepancy between the text of article 23 and that commentary which had been highlighted by the Austrian lawyer Karl Zemanek.

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47. Articles 20, 21 and 23 could lead to strange conclusions being drawn, for instance, that the elaboration of a system of norms in the field of the environment was not necessary. Since States were required to respect the territorial integrity of their neighbours, they must abstain from causing injury beyond their frontiers, and they could be held responsible, in terms of a breach of the obligation of result, if such damage occurred. That example, being in conflict with the real legal position, which was infinitely more complex, raised the question of what was wrong with the articles under consideration. In his view, the problem was, on the one hand, that the Commission had in fact dealt in those articles with the issue of fault without ever acknowledging it and, on the other hand, that the distinction between obligations of conduct or means and obligations of result, far from clarifying the issue, led to confusion. He did not see any qualitative difference between those two types of obligation, but merely a difference of degree, the obligation of conduct or means being a secondary duty relative to the primary duty, namely, the obligation of result, which, in turn, was inextricably bound up with the obligation of conduct. The issue of fault had been touched upon only in passing, and therefore remained open to doubt; that could lead to tremendous difficulties in the practical application of a future conventional regime of State responsibility. Even if the Commission had not intended to lay down rules concerning the element of fault in articles 20, 21 and 23, their provisions would certainly be interpreted as such, and they seemed, somewhat surprisingly, to establish a regime of strict or even absolute responsibility. The issue therefore warranted reconsideration.

48. In principle, three solutions could be envisaged. First, fault could be linked to the person called upon to act on behalf of the State. However, such a construction of State responsibility by analogy with private law had long since been abandoned by international practice and jurisprudence. Rightly, therefore, the draft articles focused on acts of the State as such, which were acts of the organs of a State. At the other extreme, responsibility could be viewed as the outcome of a mere comparison between what was required by an international obligation and the de facto situation which had developed, in other words, the system of strict or even absolute liability which seemed to be reflected in articles 20, 21 and 23, but which appeared to be in conflict with the current state of customary international law. The correct solution, which was amply corroborated by State practice and international jurisprudence, was dictated by common sense. While no State could be required to do the impossible, States must satisfy certain minimum requirements and must accept an objective standard of conduct corresponding to the general features of a well-organized State.

49. That premise made it clearer why the Commission had put obligations of conduct or means in a special category; although stress was laid on the fact that they required specific conduct, the real reason for omitting any reference to fault appeared to be that a State which undertook to adopt specific measures could no longer invoke its inability to abide by its commitments. Once an objective standard had been applied, there could no

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longer be any loopholes. The situation was totally different, however, with regard to the obligation of result outside the machinery which the State had pledged to establish. States were not all-powerful entities, and even the existence of effective machinery was not a guarantee of success, a matter which international law could not ignore. With regard to the material result, the same objective standard - the model of good government - could yield different results in different circumstances. The basic criterion which should be taken into account was that of due diligence which, contrary to what was often held in legal writings, should not apply only to the omissions of a State, but also to its actions.

50. To sum up, Part One of the draft articles failed to address squarely an important chapter of the law of State responsibility, suggesting instead in an indirect fashion solutions which undoubtedly did not really correspond to the intentions of its authors. A breach of an international obligation could not be found to exist simply by virtue of a comparison between a hypothetical normative course of action and developments as they had actually occurred. A breach existed only if objective standards of due diligence - which varied according to different circumstances - had not been complied with. By and large, the general tendency of the draft articles deserved full approval. They were right in emphasizing that State conduct should be measured against a strict yardstick. However, although their general philosophy should be upheld, a careful redrafting was certainly necessary. The suggested distinction between obligations of conduct and obligations of result would appear to create more difficulties than it was able to resolve. On the other hand, a provision on fault which stressed the objectiveness of the test to be employed could be of great merit. Such a provision would well fit into Part One of the draft articles because the issue of fault belonged to the general issues of State responsibility and was therefore an element of the secondary rules which the International Law Commission was at present engaged in framing.

51. It was particularly in the field of environmental protection that stress had to be placed on the strictness of the standards to be observed. A State carrying out activities with an inherent risk of harming other States had to take all appropriate measures to reduce and control that risk; lack of expertise could not justify a slackening of security standards to the detriment of other States. That proposition, of course, would hardly be challenged: the real difficulties stemmed from uncertainties about the existence and scope of the relevant primary roles. It was precisely to those uncertainties that the concept of liability for acts not prohibited by international law owed much of its importance.

52. A possible reason why the process of elaborating a consistent body of environmental norms had been so slow and cumbersome was that it had been felt for too long that the relevant problems could be settled by resorting to general and abstract rules such as Principle 21 of the Stockholm Conference of 1972, the principle of territorial integrity as opposed to territorial

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sovereignty or the maxim sic utere tuo ut alienum non laedas, whose application in concrete cases gave rise to tremendous difficulties because none of them could be regarded as absolute. To prohibit all activities capable of causing environmental pollution was impossible; a balance had to be struck between the diverging interests of States with equal sovereign rights as they competed with one another in exploiting their natural resources or the global commons. He therefore welcomed the trend which had become increasingly pronounced in recent years and would doubtless receive another boost from the World Conference to be held in June 1992 towards setting forth environmental law in terms of concrete standards of behaviour addressed to any potential author State.

53. Concomitantly with that evolution, the room left for a system of liability for injurious consequences arising out of activities not prohibited by international law was bound to shrink while that for classical State responsibility would expand, a development which would represent a tremendous gain in legal certainty and clarity. State responsibility was accepted in principle as an institution of customary international law, while liability still had to struggle for general recognition. However, although more and more fields were covered by specific environmental standards, so that, in cases of non-observance of those standards, recourse could be had to the rules of State responsibility, the situation of an unforeseen and an unavoidable accident had not yet received a satisfactory legal answer. If the obligation of due diligence had been observed, responsibility could not arise. The progressive development of international law with a view to providing compensation to the victim within a context of liability for injurious consequences of activities not prohibited by international law was thus a primary necessity.

54. Mr. ARANGIO-RUIZ (Italy) recalled that at the time of his appointment as Special Rapporteur on State responsibility in 1987, the Commission had adopted, in addition to the 35 articles of Part One, five draft articles of Part Two, which was devoted to the consequences of internationally wrongful acts. Those five draft articles contained a number of general provisions of Part Two and provided the definition of the injured State.

55. According to the outline of work presented in his preliminary report (A/CN.4/416 and Add.1), Part Two was to be divided into four sections covering, respectively, (i) the substantive consequences of ordinary internationally wrongful acts, "delicts"; (ii) the instrumental consequences of such wrongful acts; (iii) the substantive consequences of international crimes of States as defined in article 19 of Part One; and (iv) the instrumental consequences of such crimes. By substantive consequences, he meant cessation of the wrongful conduct, restitution in kind, pecuniary compensation, satisfaction and other forms of reparation. By instrumental consequences he meant countermeasures or what less recent doctrine had described as reprisals, plus any other kind of measures or sanctions possibly to be envisaged in response to an internationally wrongful act and especially to an international crime.

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56. With regard to Part Three, which was to cover the implementation of the rules on State responsibility, he had proposed that it should be reserved exclusively to the procedures for settlement of the disputes (or, possibly, of any disputes) which might arise in the interpretation and application of Parts One and Two.

57. The object of the layout was to ensure adequate treatment of the draft's most delicate and practically most significant provisions - those concerning the determination of (i) the rights and obligations of alleged victims and alleged wrongdoers, or, in other words, the substantive consequences; (ii) the countermeasures the victim could take in order to obtain redress, and the conditions and limits of lawful resort to such countermeasures; and (iii) the settlement procedures to be made available in order to ensure an equitable outcome of the crisis opened by an alleged internationally wrongful act or by the countermeasures taken in reaction thereto. In order to enable the Commission to deal adequately with such problems, it had seemed, and still seemed, indispensable to him to attain at least the same degree of articulation as that achieved by the 35 articles of Part One.

58. On the basis of the three reports submitted, respectively, in 1988, 1989 and 1991 (A/CN.4/416 and Add.1, A/CN.4/425 and Add.1, A/CN.4/440 and Add.1) and of the debates held concerning them, the Commission should be in a position to complete in 1992 the draft articles on all the consequences, both substantive and instrumental, of international delicts. In 1993, it should be able to move to the consideration of both substantive and instrumental consequences of international crimes, devoting its 1994 session to implementation problems. The two remaining years of the quinquennium would be devoted to the second reading of Part One and the finalization of Parts Two and Three. He hoped that the programme he had just outlined would allay the fears expressed by the representatives of the United Kingdom, the Czech and Slovak Federal Republic, Austria and France.

59. With regard to the substantive consequences of delicts, the Drafting Committee would be faced with a number of delicate choices, some of which would be related to the distinction between physical and moral damage and, in particular, to the treatment of moral damage to the injured State as distinct from moral damage to its nationals.

60. The Commission would also be faced with a problem which was closely linked to that of moral damage to the injured State, namely the problem of the role to be accorded to the controversial institution of "satisfaction" in the technical sense of the term, or, in other words, satisfaction as a typically international remedy, as distinguished from pecuniary compensation. The Commission would also have to settle the difficult question of fault, which, while perhaps rightly left vague in Part One, could not be ignored if the consequences of wrongful conduct were to be dealt with adequately. It was one thing to say that an act could be unlawful even in the absence of any degree of fault (negligence or dolus); it was another thing to say that negligence or

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dolus did not affect either the nature and quality of reparation or the conditions and nature of the countermeasures which were lawfully applicable. Not many Commission members had expressed their views on the subject, which was of great importance with respect to the consequences of delicts but of paramount importance with respect to the consequences of crimes. He therefore hoped that the members of the Sixth Committee would give some thought to the matter and make their views known, both on that and on the question of guarantees of non-repetition of wrongful conduct.

61. The regime of countermeasures, which was by far the most difficult aspect of the subject to tackle, was characterized by the two main features of de lege lata and de lege ferenda. Firstly, whether one looked at practice or at doctrine, one could find hardly any of the similarities to the regime of responsibility within national legal systems which made it relatively easy to transplant into international law, in the area of substantive consequences, private law sources. Secondly, the lack of an adequate institutional framework in the "society of States" made it very difficult to determine the features of any exiting or even conceivable regulation of the conduct of States. On the one hand, all States had a tendency not to accept any authority above themselves. On the other hand, despite the principle of equality, factual inequalities tempted stronger States to impose their economic, if not military power. The fact that that was obvious by no means made the problem any easier to solve. Indeed, one of the crucial aspects of the Commission's task appeared to be to find ways, through a combination of the best of lex lata with prudent but not unimaginative progressive development, of reducing the impact of the great inequality among States failing adequate third-party settlement commitments - in the exercise of their faculté (and possibly obligation) to apply countermeasures. Progressive development appeared to be imperative with regard to both Part Two and Part Three.

62. Whether the Commission would be able to do enough in that respect remained to be seen. The elimination of the main source of ideological conflict was a positive factor, although not free of worrying side-effects. In addition, other signs which had recently come to the fore were still difficult to interpret, notably the ambiguous concept of a "new international order". The serious crisis which had caused the concept to be evoked had also had interesting repercussions which bore directly upon State responsibility.

63. The more the areas within which States were bound by international obligations was extended, the more essential it became that adequate rules should be codified and progressively developed in order to ensure compliance with international obligations; international responsibility represented practically everything which general international law possessed by way of instrumentalities of implementation. He therefore hoped that in the coming quinquennium the Commission would give priority to the topic of State responsibility and the related topic of international liability for injurious consequences arising out of acts not prohibited by international law.

64. Mr. Afonso (Mozambique) resumed the Chair.

65. Mr. DE SARAM (Sri Lanka) said that the Commission should now complete as soon as possible its work on Part Two and Part Three (if there was to be one) of its draft articles on State responsibility, and thus conclude its first reading of the draft articles as a whole. It could then begin the second reading before its next five-year term came to an end, which would be a substantial accomplishment. In any event, it should proceed very carefully to ensure that, once adopted in the form of a convention, the draft articles would attract the widest possible adherence by States, given the enormous effort and time which had been invested in them.

66. Regarding the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the time had come for careful and conclusive consideration to be given to what exactly the Commission should do with the topic and how it should proceed.

67. Under it current title, the topic was clearly elusive. One reason was that the title gave the topic a very wide scope; the topic could now be viewed as reaching out, in fact, to encompass all inter-State relations, except such conduct as was prohibited by treaty or by the generally recognized rules of customary international law. Another reason was that the demarcation line between the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility remained poorly defined. In fact, Part One of the draft articles on State responsibility was not explicit as to whether, in the area of non-contractual obligations, liability for harm to one State resulting from a lawful activity on the territory of another State would arise only should the latter State be shown to be at "fault": in other words, only if the harm in question was shown to have resulted from an intentional act or negligence attributable to the "author" State. Under the topic of international liability for injurious consequences rising out of acts not prohibited by international law what was being dealt with was - principally - the case where lawful activity on the territory of one State might, notwithstanding the absence of fault on the part of that State, give rise to harm of extreme gravity and scope, and even harm on a disastrous or catastrophic scale, on the territory of another State.

68. In order to deal with the difficulties in question, as the Special Rapporteur had indicated, manageable perimeters should be established for the topic, along the following lines: (a) the topic should be limited to physical harm; (b) what was being dealt with was principally, and possibly even exclusively, cases where disastrous or catastrophic transboundary harm was caused in one State by a lawful activity in another State; (c) at the current stage, it would be advisable not to enter too deeply into the question of harm caused to areas outside the jurisdiction of any State - in other words, into matters relating to the "global commons"; (d) on the basis of the criterion of fault, a demarcation line should be established between the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility.

(Mr. De Saram, Sri Lanka)

69. With regard to the manner in which the Commission should proceed, it must be borne in mind that the Commission must operate on the basis of consensus. That was where the difficulties experienced by the Commission arose: on the one hand there was the view that the principle sic utere tuo ut alienum non laedas, which lay at the heart of the topic, should be incorporated into the draft articles as a general rule of inter-State relations; and on the other hand there was the view that that principle had a proper place only in treaties on specific matters. The question thus arose as to whether it was indeed realistic for the Commission still to endeavour to formulate a general multilateral convention on the topic in question - even in the form of a framework convention - or whether it would be preferable to consider alternatives, such as the conclusion of bilateral agreements and regional multilateral agreements between States regarding specific activities of a particularly dangerous nature or a declaration of general principles by the General Assembly along the lines of that being prepared by the Legal Subcommittee on the Peaceful Uses of Outer Space regarding the use of nuclear power sources in outer space. In any event, the Commission must not continue with the frustrating approach which it had taken over the past 10 years.

70. As to the substance of the topic, with regard to the question of whether those who had suffered damage should be required to exhaust all remedies in the "author" State before a claim was presentable at the inter-State level, a solution should be adopted similar to that provided for in the Convention on International Liability for Damage caused by Space Objects, which gave the victim of damage the possibility of presenting a claim for compensation to the "author" State at the inter-State level without having first exhausted local remedies, but excluded the admissibility of a claim at the inter-State level if a victim had decided to take advantage of local remedies available in the "author" State.

71. Lastly, special financing arrangements would have to be envisaged for transboundary harm that was so vast that it called for compensation that exceeded the limits usually provided for in most countries for such cases. Some international instruments already included such provisions. For example, the International Convention of 1971 on the establishment of an International Fund for Compensation for Oil Pollution Damage and the Convention of 1988 on the Regulation of Antarctic Mineral Resource Activities. Needless to say, the problems involved in establishing a compensation fund were not easy to solve. Nevertheless, the question should be considered.

72. Mr. VILLAGRAN KRAMER (Guatemala) said that it was surprising that the Committee should be constantly finding fault whenever significant progress was made in respect of the draft Code of Crimes against the Peace and Security of Mankind. One might wonder whether States really wanted to have a satisfactory code by the end of the twentieth century.

(Mr. Villagran Kramer, Guatemala)

73. The methodology used by the Commission was very useful even though it no longer maintained a distinction between crimes against peace, war crimes and crimes against humanity. That methodology made it possible to distinguish between the effects of classification of crimes, penalties and the field of application of various jurisdictions in respect of the State and individuals responsible for crimes. However, the time had come to reassess that method.

74. In the view of his delegation, if it was actions that gave rise to criminal responsibility, they were also attributable directly to individuals. It was crucial to stress, however, that the Charter of the United Nations did not attribute responsibility to State officials, but to States themselves in cases of aggression. It was for the Security Council to determine the aggressor State and, logically, the Council should also determine who were the officials directly involved. In that case it was States which could be brought to justice.

75. The Organization of American States had considered that question in relation to mutual assistance and had established that a regional body could also determine that a State was the aggressor when aggression was perpetrated at the regional level. Consequently, the Security Council was not the only competent body on the subject. Regional bodies were also competent. The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could consider the possibility of coordinating the search, within the United Nations and the Security Council for a solution to that particular problem, in cooperation with the regional organizations.

76. His delegation felt that intervention must be retained as a crime in the Code for the very simple reason that small countries were the most vulnerable to intervention or attacks on the part of powerful countries. The list of crimes must remain open. The Commission must continue to consider the question so that, if necessary, it would be able to include in the list other crimes or offences which might materialize in the future.

77. With regard to penalties or punishment, a penalty should be envisaged for each specific crime. While it was true that there was no penalty that was common to all legal systems, the penalty of imprisonment existed in all legal systems. The severity of the penalty must therefore depend on the seriousness of the crime committed.

78. The confiscation of property acquired illegally must be envisaged and regulated by the Code on the basis of two precedents: the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provided for the confiscation of such property, including funds deposited in banks, and the Inter-American Juridical Committee, which was working to establish a framework to determine not only the civil effects of that type of crime, but also specific measures which could be laid down to supplement criminal penalties.

(Mr. Villagran Kramer, Guatemala)

79. On the subject of State responsibility, he said that that the extensive judicial practice on the subject in the form of arbitral awards and decisions taken by courts and by the International Court of Justice, which was the primary source for the draft articles, should be embodied to the greatest possible extent in an international instrument.

80. International liability for injurious consequences arising out of acts not prohibited by international law was not yet governed by a general principle; that shortcoming must therefore be remedied. To that end, there were at least two parameters which should be taken into account in identifying the content of that concept: (a) no one could avoid the consequences of his acts and (b) there must be reparation for all damage caused. Those two parameters, which were embodied in the form of general principles in some legal systems, should be a guide at the international level in formulating a text which would make it possible to find the best solution to the question.

81. It was not yet clear whether the instrument should include acts involving an element of transboundary risk and whether due diligence, or the obligation of prevention, should at least be considered as forming an integral part of the question. At all events, the Commission must take up the question of risk to the extent that it involved the application of the theory of so-called objective responsibility; it was not possible to disregard the requirement of due diligence in the modern world when considering activities involving elements of risk. That was an important question for developing countries, but even more so for industrialized countries. The developing countries had to insist that it was activities involving risk that gave rise to the application of the theory of objective responsibility. That question was not simply a matter for the domestic law of States but could also be regulated by international law; when damage was transboundary in nature, it exceeded the competence of the domestic judge. It was therefore very important to have an international mechanism which would replace the domestic regime in such cases. The State could adopt internal regulations, but the coordination of such rules at the international level was essential so as to enable individuals to have a satisfactory text they could resort to.

The meeting rose at 5.55 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
34th meeting
held on
Monday, 11 November 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman:	Mr. NEDELCHEV (Rapporteur)	(Bulgaria)
later:	Mr. AFONSO (Chairman)	(Mozambique)

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91-57286 5354S (E)

Distr. GENERAL
A/C.6/46/SR.34
27 November 1991
ENGLISH
ORIGINAL: FRENCH

In the absence of the Chairman, Mr. Nedelchev (Bulgaria), Rapporteur, took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 131: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/46/L.9)

1. The CHAIRMAN announced that Bulgaria had joined the sponsors of draft resolution A/C.6/46/L.9, which contained a Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10 and 405)

2. Mr. Afonso (Mozambique) assumed the Chair.

3. Mr. NATHAN (Israel), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that it would appear from the title of the topic that the Commission had set out to make new law rather than to codify existing law, since there would otherwise have been no point in using the term "acts not prohibited by international law" in respect of injurious consequences; in other words, at the current stage, the acts causing injury were not prohibited by international law. As the object of the draft articles would be to lay down principles relating to liability for the injurious consequences in question, the Commission might consider adopting a different title for the proposed articles which would reflect that object. His delegation concurred with the statement on that point by the representative of the United Kingdom.

4. At least some of the harmful activities to be prohibited by the intended instrument were governed by the principle sic utere tuo ut alienum non laedas, the natural application of that principle, as the Commission had rightly pointed out in paragraph 225 of its report, being that the innocent victim should not be left to bear the burden of his loss. As to the scope of the topic, the proposed instrument might well deal with activities involving risk of causing harm as well as with those actually causing transboundary harm and the duty of reparation due from the author State to the victim injured by the harmful activity.

5. With regard to the duty of prevention of harmful activities, while the proposed instrument might lay down the general duty of prevention of transboundary harm, it was doubtful whether the instrument should specify in detail the preventive measures to be taken by States; such matters would be better included in model rules to be annexed to a binding instrument. As the Commission had rightly stated, the proposed instrument should strike a balance

(Mr. Nathan, Israel)

between, on the one hand, allowing States their legitimate freedom of action on their territory and, on the other hand, ensuring that States would exercise due care to prevent harmful transboundary results from such activities.

6. On the issue of liability for the results of harmful activities, absolute or strict liability of States should be ruled out, if only because harmful activities would in many cases be conducted not by States but by private operators. On the other hand, the State could still be held liable when the State itself, its organs or agents, were conducting the activity causing the harmful results, or where the State failed in its duty to take the necessary measures to prevent the harmful result. Such duty included the taking of such measures, by way of legislation, administration, supervision and enforcement, as were required in order to prevent or reduce to a minimum the risk of causing transboundary harm.

7. It should be recognized that it would be very difficult to set out an elaborate system for the civil liability of the operator in view of the different treatment of that matter under the domestic law of the various States. In so far as claims against private operators were concerned, individual claimants should first exhaust local remedies before resorting to the international remedies to be provided in the proposed instrument. Lastly, it was doubtful whether the time was ripe to include the issue of the "global commons" in the framework of the topic.

8. On the topic of "Relations between States and international organizations", dealt with in chapter VI of the Commission's report, there should be general agreement, as indicated in paragraph 284 of the report, that the main criterion to be applied in granting privileges and immunities to international organizations was "functional necessity". That functional test was borne out, inter alia, by article 13 of the draft articles, which provided for the free circulation and distribution of the publications of international organizations "necessary for their activities".

9. In draft article 15, the first clause would appear to be covered by article 12, paragraph 1; the second clause might be superfluous.

10. Draft article 16 would be contingent on any of the relevant provisions of the convention on the diplomatic courier and the diplomatic bag that might be applicable to the diplomatic bag of international organizations.

11. In article 18, dealing with tax exemptions, the more general term of "charges" might be more appropriate than the term "taxes". That would be more in line with the latter part of section 7 (a), of the Convention of 1946 on the Privileges and Immunities of the United Nations, which referred to "charges" in contradistinction to "taxes", which were transferred to the treasury of the State. Lastly, in article 21, paragraph 1, the words "in principle" had no legal effect and might be replaced by the words "as a general rule".

12. Mr. FARRUKH (Pakistan), referring to chapter III of the Commission's report which dealt with the law of the non-navigational uses of international watercourses, said that his delegation attached great importance to the topic. In Pakistan, agriculture was the mainstay of the national economy, as about 70 per cent of the population was engaged in farming and agro-based activities. Pakistan therefore believed it was necessary to develop rules for the equitable utilization, conservation and protection of international watercourses. There must be an equitable balance between the rights of lower and upper riparian States, and watercourse States must cooperate with each other in order to solve water-related hazards, eliminate harmful conditions and protect watercourses.

13. On the question of whether to include groundwater in the definition of a watercourse, the debate as reflected in the report indicated divergent views. While some members favoured the inclusion of groundwater, particularly "free" groundwater, in the definition, others did not. He had noted with interest the observations of the United Kingdom representative indicating some difficulty in determining the extent of obligations of States if groundwater was included in the definition of a watercourse. With underground water, the location and size of the resource and its interaction with the watercourses of other States might not be known. It was true that such questions could - with time, money and expertise - be investigated, but States - particularly developing States - might have other, prior calls on their resources. It was therefore important for the Commission to address that issue in more detail.

14. His delegation had noted with interest the principle underlying article 10, "Relationship between uses", and believed that special attention must be paid to equitable utilization, protection and conservation of water resources.

15. With regard to articles 26, 27 and 28, dealing respectively with management, regulation and installations, he noted that in recent years there had been increased cooperation among watercourse States for the optimal utilization, management and protection of international watercourses. The idea of establishing a joint management mechanism embodied in article 26 was an interesting one. The term "mechanism" was preferable to "organization" since it provided for less formal means of management. The need for management of international watercourses on an agreed basis could not be overemphasized, and the consultations and cooperation between watercourse States provided for in article 26 were important. However, in the event of a conflict of socio-economic interests between watercourse States, the concept of consultation as envisaged by the Special Rapporteur should also include an obligation to negotiate in order to reach a just and equitable solution. Article 26 could be improved and required further consideration by the Commission.

16. With regard to article 27, his delegation was aware of the importance of the regulation of international watercourses and the need for cooperation between States in that field, both to prevent dangers such as floods and erosion and to maximize the benefits that might be obtained from the

(Mr. Farrukh, Pakistan)

watercourse for the watercourse States on a just and equitable basis without any significant change in the flow of water to the lower riparian State. The Commission should therefore discuss article 27 further with a view to its elaboration.

17. As to articles 28 and 29, it should be obligatory for watercourse States to do their utmost to maintain and protect international watercourses and related installations, facilities and other works from wilful or negligent acts and from the forces of nature. Article 28 should not only oblige States to prevent contamination of water resources but should also prohibit any efforts to cut the water supply of watercourse States, dry up springs, or divert rivers from their course. The liability for such wilful or negligent acts must be a strict liability so that the State responsible for causing harm to other watercourse States was made liable for the consequent damage.

18. Turning to the question of jurisdictional immunities of States and their property, he noted that the debate on the subject in the Commission had revealed a divergence of views between those States in favour of absolute immunity and those in favour of restrictive immunity. His own country's law departed from the traditional doctrine of absolute immunity and restricted immunity to sovereign acts.

19. On the question of State responsibility, his delegation welcomed the fact that the Special Rapporteur had been able to introduce his report, which dealt with the "instrumental" consequences of an internationally wrongful act or "countermeasures", namely with the legal regime of the measures that an injured State could take against a State which committed an internationally wrongful act, notably, in principle, with the measures applicable in the case of delicts. He hoped that the Commission would make progress on the topic at its future sessions.

20. Turning to the draft Code of Crimes against the Peace and Security of Mankind, and specifically the question of penalties, he said that the view that a penalty should be specified for each crime was reasonable. Each crime had a specific and individual nature, and the gravity of the penalties would depend on the nature of the crime and the circumstances under which it had been committed. It should not be left for the judge to decide the question, and the Code itself should set a minimum and maximum penalty for each crime. However, the Commission should give more extensive consideration to the subject after obtaining the views of Governments.

21. With regard to article 3, paragraph 2, he felt that abetment should be dealt with in a separate article. In the same connection, the use of the word "abetting" in the definition of complicity was incorrect. Abetment was an offence in itself, like conspiracy and attempt. In criminal law those offences did not come within the purview of complicity.

22. With regard to article 15 on aggression and article 16 on the threat of aggression, he noted that intention was not one of the constituent elements of

(Mr. Farrukh, Pakistan)

aggression and that, consequently, the provision concerning the responsibility of individuals for the crime in question was ambiguous. It left excessive discretion to the courts and, as the courts would be those of the country which had been the victim of aggression, even if justice had been done, it would not have been seen to be done. There could also be conflicting interpretations of an alleged act of aggression, if nationals of the country alleged to have committed aggression were tried in different courts, as was possible under the draft articles.

23. With regard to article 17 on intervention, he felt that the use of arms should not form part of the definition of intervention and the word "armed" inside square brackets in paragraph 2 of the article should be deleted.

24. In article 19 the definition of genocide should be amended to cover all reasonable possibilities and the words "national, ethnic, racial or religious group" should be replaced by "national, ethnic, racial, religious or other groups".

25. He welcomed the fact that colonial domination and other forms of alien domination had been included in the draft Code. At the forty-fourth session of the General Assembly, his delegation had supported the inclusion in the draft Code of the crime of forced massive expulsion of population from an occupied territory aimed at changing the demographic character of that territory, and he was pleased to see that it had been included in article 21 on systematic or mass violations of human rights. His delegation had also supported the wording of the definition of "exceptionally serious war crimes", which had now been included in article 22, paragraph 2.

26. On the issue of the Commission's future work, his delegation believed that the Commission should complete its work on the unfinished topics before it. Specifically, it should expedite its work on the subject of State responsibility so as to complete its first reading of the draft articles. It should also proceed to the second reading of the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on the law of the non-navigational uses of international watercourses, after receiving the observations and remarks of Member States.

27. Mr. PAZARCI (Turkey), referring to chapter II of the report, on jurisdictional immunities of States and their property, said that his delegation supported the Commission's recommendation to the General Assembly that a diplomatic conference on the subject should be convened at a date to be determined by the Assembly. The draft articles adopted by the Commission were satisfactory and balanced and offered a sound basis for discussion. Nevertheless, there was room for further improvement. For example, draft article 11 on contracts of employment did not take account of the nature of administrative contracts in connection with immunity from jurisdiction. Admittedly, paragraph 2 of the article recognized the possibility of invoking immunity from jurisdiction in cases where the employee had been recruited to perform functions closely related to the exercise of governmental authority,

(Mr. Pazarci, Turkey)

but that provision was not sufficient to cover all categories of administrative contracts which should benefit from immunity.

28. Similarly, draft article 17 on the effect of an arbitration agreement was wrong to consider that the fact of submitting to arbitration (probably international arbitration) a contract concluded between a State and a foreign individual person was tantamount to the waiver by that State of its immunity from the jurisdiction of a court of another State in proceedings relating to the validity or interpretation of the contract, the arbitration procedure or the setting aside of arbitral awards.

29. Regarding the draft articles on the law of the non-navigational uses of international watercourses, his delegation believed that, while not without merit, they were not satisfactory in every aspect. In fact, the draft focused on the damage which could be caused to watercourses and their ecosystems, and failed to take sufficient account of the economic development requirements of watercourse States. The imbalance between the place accorded to development and that accorded to protection gave rise to a further imbalance, namely between the interests of upstream States and those of downstream States. In their current state, the draft articles could be used to maintain the status quo, causing difficulties or delays to those upstream States which wished to develop their watercourses by obliging them to obtain the approval of the downstream State or States on each occasion.

30. Furthermore, the Turkish delegation had doubts regarding the admissibility of the concept of watercourses which the Commission had finally retained. In fact, by using a relatively broad wording which encompassed canals, glaciers and, above all, underground water linked to an international watercourse, the Commission had enlarged the scope of rules normally formulated for surface waters. In so doing, not only was the Commission exceeding its mandate, but it was making it still more difficult to formulate draft articles on a subject which was already extremely complex by its very nature.

31. Regarding the draft Code of Crimes against the Peace and Security of Mankind, his delegation felt that it was most important to avoid any risk of dispute regarding the categories of crimes included in the draft articles and to ensure that they were well-defined. It was equally important to characterize crimes not in terms of political and subjective considerations, but in terms of the general legal interest of the overall international community. Given the diversity of international documents and the varying legal force of such instruments, one had to be wary of characterizing as crimes in the legal sense acts which, hitherto, had been regarded solely in political terms, and of attributing to individuals responsibility for acts hitherto attributable to States. The risk increased if, in addition, the crimes in question were defined in general terms. Some concepts, intended more for use by political organizations, ran the risk of failing to exhibit the precision and rigour normally demanded of legal concepts.

(Mr. Pazarci, Turkey)

32. Draft article 15 on aggression was a good example. The text contained a provision which had no place in a legal document intended to characterize a crime. The provision in question was subparagraph (h) of paragraph 4, which characterized as a crime "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter". The provision, which empowered the Security Council to characterize the act in question as a crime once it had been committed, did not have the legal precision required in order to punish the perpetrator of the act. Moreover, the Turkish delegation doubted whether the provision respected the well-known principle in penal law expressed in the phrase nullum crimen sine lege. Draft article 16 on the threat of aggression also left wide scope for subjective appraisal. He read out paragraph 2 of the draft article, and said he did not believe that such subjective criteria, which were liable to be exploited for political purposes were truly adequate to condemn individuals as criminals. Such criticisms were equally valid with regard to other provisions of the draft articles.

33. Mr. SOLIMAN (Egypt) said that his delegation approved the Commission's recommendation to convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject. It believed that, given the technical nature of the draft articles, such a conference would be better able to settle pending questions, and it did not therefore favour the creation of a working group in the Sixth Committee for that purpose.

34. The law of the non-navigational uses of international watercourses was an issue - extremely important for Egypt - which should be settled in such a manner as to ensure cooperation between States and avoid prejudicing the interests of other States, since that would have repercussions for stability and good-neighbourly relations between watercourse States. The formulation of a framework agreement on the subject should take into consideration the following fundamental points: the question was not purely legal and had extremely delicate political aspects; it would be difficult for a convention which was too detailed to take into consideration the nature of relations between the States of a given watercourse and the specificity of undertakings related to the use of watercourses; each international watercourse had its own features and by considering only their shared features, nothing but general principles regarding the administration and management of international watercourse systems could be set forth. For that reason, his delegation believed that one would have to be content with a framework agreement, otherwise the legal regulations would not permit States to manage such vital resources. Regarding the joint management mechanism which could be established, there were already numerous precedents, some of which had been mentioned during the Commission's debate on the draft articles provisionally adopted.

35. As for international liability for injurious consequences arising out of acts not prohibited by international law, the rapid progress achieved in scientific and technical fields had increased the activities which threatened

(Mr. Soliman, Egypt)

to result in transborder harm. Justice demanded that the innocent victims of such harm should not be forgotten, but the codification of liability should not impede scientific and technical progress.

36. The question should be examined in the light of conventions already adopted in that area in order to create a set of general provisions which States should respect when undertaking activities that involved risk. The provisions should clearly define the concept of risk. Moreover, in drawing up the provisions on burden of proof - proof of the occurrence of harm entailing liability and giving rise to the right to compensation or proof that there was no liability, the limited technical capacities of the developing countries must be taken into account.

37. His delegation believed that the aim was to achieve a framework agreement containing key provisions which should be respected by those undertaking an activity involving risk. As for the concept of "risk", the Egyptian delegation thought that it could be useful to define the nature of the preventive measures which should be taken when undertaking a potentially dangerous activity. It could also serve as a compulsory criterion for determining the amount of compensation. Liability should arise from harm and one of its constituent elements was the fact that the necessary preventive measures had not been taken. It was also possible to provide for criteria for harm which would allow the corresponding compensation to be determined.

38. Regarding activities carried out by specific entities in a State, the State should assume its responsibilities and compensate the victims. The national laws should specify the relations between the State and the said entities by determining who, in the last resort, was responsible for compensation. Cooperation played a vital role in that respect and the draft articles should, in particular, specify the obligations regarding notification and consultation which could help determine liability in cases of harm or take preventive measures, which was essential for determining the amount of compensation. The provisions of the framework agreement should prevail over those contained in instruments on particular fields. Furthermore, it was important to state clearly that such provisions did not affect international law regarding military occupation.

39. In conclusion, he stated that the subjects proposed for inclusion in the Commission's long-term work programme were not, with one or two exceptions, priority matters, having already been studied by other organizations or already dealt with in the context of conventions on similar themes or within another legal framework. Given that the Commission still had much to do regarding the subjects currently included in its work programme, it should take stock of its achievements and propose subjects which would allow it to fill potential loopholes or which had high priority in the contemporary world.

The meeting rose at 4.15 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
35th meeting
held on
Tuesday, 12 November 1991
at 10 a.m.
New York

SUMMARY RECORD OF THE 35th MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)

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Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

91-57334 5237S (E)

Distr. GENERAL
A/C.6/46/SR.35
19 November 1991

ORIGINAL: ENGLISH

The meeting was called to order at 10.05 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. MARTINEZ GONDRA (Argentina), referring to the programme of work of the International Law Commission, observed that if no new items were added, the Commission would soon be dealing only with State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and relations between States and international organizations. His delegation therefore considered that the addition of other items would help to maintain continuity in the Commission's contribution to the codification and progressive development of international law. For instance, the recognition of States, Governments and legal situations, a classic theme of international law, had evolved considerably in recent years and might deserve to be studied. Similarly, items related to the environment were certainly very urgent, and legal principles needed to be formulated to help States to cooperate on environmental protection. With regard to the topics already suggested for consideration, he questioned whether the law of confined international groundwaters should be studied, as such waters constituted a very large percentage of the Earth's available drinking water. In any case, before taking a decision concerning that topic it would be advisable to consider the extent to which such confined waters were used in human activities and how necessary international legal regulation thereof might be. An in-depth review of the Commission's future agenda was necessary and should, perhaps, be undertaken by a special working group. In any event, the Commission should not take on, or have imposed on it, unrealistic topics or impossible missions, but should examine more practical questions and those of great utility to States.

2. On several occasions, delegations had expressed the view that the Commission's methods of work were too dilatory. In view of the high quality of the Commission's work, however, such concerns seemed a little exaggerated. That was not to say that those methods could not be improved, particularly in the case of the Drafting Committee, which took a very responsible approach to its difficult task but could nevertheless function in a somewhat more orderly and expeditious fashion.

3. With respect to the topic "Jurisdictional immunities of States and their property", Argentina planned to present written observations, as requested by the Commission, but that might take some time since various departments of the State, apart from the Ministry for Foreign Affairs, were involved.

4. As many delegations had observed, in doctrine and in practice there were two diametrically opposed positions with regard to the scope of State immunity. The Commission's great contribution had been to reconcile both positions in a single text, although it was clear from the remarks of some delegations that that goal had not been fully achieved. In that context, it was necessary to consider how to proceed; one suggestion was that a

(Mr. Martinez Gondra, Argentina)

comprehensive convention on the matter was necessary or at least would be very useful. That seemed to be the opinion of many delegations, and Argentina agreed. It also welcomed the idea of convening a working group of the Sixth Committee before the holding of a codification conference so as to overcome through negotiation any differences of opinion that might persist.

5. With respect to the draft articles on the law of the non-navigational uses of international watercourses, his delegation agreed with the broad outlines of the draft, the essence of which was contained in articles 2, 5, 6 and 7. The draft recognized the concept of a watercourse "system", or the idea that the waters of such a system were interconnected in such a way that they constituted, by virtue of their physical relationship, a unitary whole. That concept should extend to all the waters making up a system, including groundwater, since what was done in any part of the system would affect the rest. The more groundwater connected with international watercourses a country had, the greater its need to have some means of protecting its water resources. The concept of a watercourse system implied a close relationship between watercourse States, since they shared a natural resource; their solidarity was certainly greater than mere good-neighbourliness. They were not so much neighbours as joint owners.

6. With respect to article 7, some delegations had expressed doubts as to the appropriateness of using the word "appreciable" to qualify "harm". The word did introduce an element of subjectivity, but it provided a threshold that could be set higher or lower depending whether the word was interpreted to mean "significant" or "substantial", for instance. The Special Rapporteur and the Commission preferred to keep the threshold low; Argentina, too, had concluded various agreements with neighbouring countries using the Spanish phrase "daño sensible", which in English was translated as "appreciable", and accordingly preferred that term to others. His delegation considered the principle of non-discrimination acceptable, but wondered, in view of its nature, whether it should not be included in part II, "General principles".

7. With respect to the draft Code of Crimes against the Peace and Security of Mankind, his delegation considered that important aspects of the topic would require a decision at the political level, but that the Commission should deal with the technical aspects and overcome any foreseeable legal obstacles so as to enable Governments to take a political decision.

8. Penalties should not be left to the sole decision of the courts, as their consistency would be affected and the principle nullum crimen, nulla poena sine lege might be violated. In liberal criminal law, penalties should always be known before the offences were committed. The best solution would be the one provisionally adopted by the Commission, namely, that penalties should be set in the Code itself. However, a single penalty could not be established for all offences; rather, each crime should entail a penalty that varied between a given minimum and maximum at the discretion of the judge. That was the system followed in the penal codes of many countries.

(Mr. Martinez Gondra, Argentina)

9. With regard to an international criminal court, in theory, any legal order should have its own court, but establishing such a court would entail practical difficulties. The decision whether to establish the court or not was basically a political decision that would depend on the evolution of the international community and its collective values. The General Assembly's failure to pronounce on the question could be interpreted as indicating that it was an idea whose time had not yet come. The matter was a complex one which the Commission should continue to study.

10. The topic "State responsibility" had been on the Commission's agenda since 1975, but no substantial progress had been made. Higher priority should therefore be given to the topic.

11. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, much had been said about the lack of agreement on the basic premises of the draft. The Special Rapporteur had included provisional articles in successive reports to stimulate debate and not as concrete proposals. However, broad areas of consensus, or trends of thought that could lead to future consensus, were apparent in chapter V of the Commission's report, on the following points.

12. The basic principle, inspired by article 21 of the Stockholm Declaration, would recognize the free exercise of all human activities not prohibited by the State in its territory, within the limits imposed by liability for the harmful consequences thereof beyond the borders of the State; the victim should not be left to bear the loss alone. Liability was based on harm, and not on risk; there had previously been much confusion on that point. There was a consensus on the principle of cooperation to prevent incidents and on the containment and minimization of transboundary harm. The majority of delegations would prefer that prevention procedures should be the subject of a separate non-binding instrument, but would agree that States should assume a unilateral prevention obligation (i.e. the obligation to adopt the necessary laws and regulations and the appropriate political and judicial measures. A very large majority was in favour of compensation for any transboundary harm caused, and there was agreement on the principle of non-discrimination set forth in article 10. There was also agreement as to the role to be played with regard to the topic by the concept of balance of interests. A very large majority was in favour of using the term "activities" rather than the term "acts" in the title of the topic. As liability was based on transboundary harm, the latter included the harm produced by activities involving risk as well as by those with harmful effects. There should be a threshold for harm, but there was no agreement on its level or on the modifying adjective to be used; both "appreciable" and "significant" had been suggested, although the latter seemed to be preferred. Harm had to be a physical consequence of the activity in question. A large majority thought the articles should regulate civil liability, and that any liability incurred by the State should be residual in nature. Lastly, there was a consensus that the final instrument should be more general and simpler than the draft.

(Mr. Martinez Gondra, Argentina)

13. Many members of the Commission and many delegations had recommended a high priority for the topic during the next quinquennium; his delegation agreed with that recommendation. A simple, brief and principle-based instrument seemed to represent the only chance for consensus in an area where numerous conventions regulated specific dangerous or harmful activities.

14. Mr. VUKAS (Yugoslavia) said that the topic of State responsibility, which the Commission had been unable to consider in 1991 for lack of time, was the most important one on its agenda. The topic had been selected as suitable for consideration as early as 1949, but its codification was still a long way off, and the Commission should therefore give it priority.

15. On international liability for injurious consequences arising out of acts not prohibited by international law, he supported the idea of replacing the word "acts" in the title by "activities", particularly in view of the translation of the future instrument into the majority of languages spoken in Yugoslavia, but saw deeper problems with the title, relating to the scope and content of the draft articles. The draft dealt exlusively with the protection and preservation of the environment, although some other activities not prohibited by international law could entail international liability: for example, financial, trade or traffic activities. That content should be more accurately reflected in the title. Furthermore, Liability, the key word in the exisiting title, was dealt with in only one part of the draft instrument. Equally important in the text, and obviously more acceptable to States, were the provisions on international cooperation in preventing injurious consequences.

16. His delegation had no definite preference for either a binding or a recommendatory instrument. Treaties, however, had a greater impact on the behaviour of States than any kind of so-called "soft law". In any event, the nature of the instrument should be decided soon, as the concept of the rules adopted and their drafting could differ widely in consequence.

17. It should be borne in mind that many global and regional instruments already existed on environmental protection, and particularly on the prevention and abatement of marine pollution, but it was also true that States avoided accepting provisions on liability. Even in cases of catastrophes such as Chernobyl, States reacted by concluding treaties on early notification, assistance and other similarly important and, for them, more acceptable responsibilities in respect of environmental protection, rather than by discussing and applying civil liability and compensation. Hence, States might not be extremely enthusiastic about adopting and ratifying a convention containing elaborate rules on civil liability. In any event, Yugoslavia would not favour a division of the draft articles into two instruments, one representing "hard law" and the other "soft law".

(Mr. Vukas, Yugoslavia)

18. With respect to the scope of the topic, his delegation agreed with the Special Rapporteur that the instrument should deal both with activities involving risk and with those causing transboundary harm, and should treat them together.

19. Yugoslavia did not favour the inclusion of a list of dangerous substances in the instrument itself, though such a list could be annexed in the form of guidelines.

20. In respect of the principles relevant to the topic, his delegation agreed with the approach of the Special Rapporteur, and indeed had advocated the previous year strict liability for the operator, with residual liability being assigned to the State.

21. On the principle of prevention, his delegation had to take into account the relevant facts of the current war in the Republic of Croatia. Damage to the environment of Yugoslavia was already considerable and threats of transboundary harm were very serious. Most of such damage had been caused by acts that could be qualified as crimes against the peace and security of mankind. However, some of the harmful activities undertaken in order to avoid the effects of such crimes, as well as other hazardous activities caused by the war, were permitted under international law. In view of that unfortunate example, the competent international organizations might take a more active role than was proposed in draft articles 11 and 12. The United Nations Environment Programme or another body of the United Nations system should be entrusted with entering into contact with and influencing all those concerned so as to avoid or at least lessen the threat to nature. Naturally, Yugoslavia was not in favour of any separation of the substantive provision on prevention, contained in article 8, from the articles on the procedure for carrying out prevention.

22. Harm to the "global commons" should be included in the draft articles. The main principles of cooperation, prevention, and so on, should be appropriately applied to any harm caused beyond the limits of national jurisdiction, whether to another State or to mankind as a whole. The fact that the problems of liability were even more complicated in the case of harm to the "global commons" than in respect of harm caused to States and their citizens, should not play a decisive role with regard to the extension of the scope of the instrument.

23. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

24. Mrs. FLORES (Uruguay), referring to the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", said that the crux of the question was prevention and reparation of transboundary harm. From the outset of the Commission's work on the topic, there had been a tendency to reject the existence of illegality in respect of transboundary harm. Her delegation felt, however, that such illegality could

(Mrs. Flores, Uruguay)

exist and that it was therefore possible to secure reparation on the basis of classic international responsibility. A State, in authorizing or carrying out an activity, was implicitly authorizing the consequences of such activity. If those consequences constituted transboundary harm the right of territorial sovereignty of the other State was infringed and that State was forced to bear damage in an area which was outside the jurisdiction or control of the State of origin of the activity. States had an obligation not to use or allow the use of their territory in a way that would infringe on the rights of other States. Transboundary harm infringed on the territorial integrity and inviolability of other States, and was in violation of the duty of non-interference laid down in customary international law and embodied in the precept "sic utere tuo ut alienum non laedas". It could also infringe upon the right to life, health, property, and so on and could be detrimental to the environment and to permanent sovereignty over natural resources. Those considerations did not exclude the possibility of an absolute liability regime in cases of transboundary harm. The affected party could opt to secure reparation under the liability regime most suited to him, as had occurred in the case of the Amoco Cadiz oil tanker. Minor damage should be covered under the application of the general principle of good-neighbourliness laid down in the Preamble and in Article 74 of the Charter of the United Nations.

25. Her delegation agreed that the title of the topic should be changed and simplified. It could then be made clear in the text that the activities referred to in the title were not prohibited by international law, because otherwise reparations for damage would be based on classic international responsibility. Her delegation felt that that instrument should be a framework convention with binding force.

26. In respect of activities involving risk, it was very difficult to determine whether there was a higher than normal probability of causing transboundary harm; it might therefore be more useful to refer to any activity that could cause such harm. In some circumstances activities such as routine agricultural operations could be more harmful than those classified as activities "involving risk". It would also be useful to include in the draft the principle that the innocent victim should not be left to bear the loss alone.

27. Her delegation felt it was appropriate to apply the criterion of balance of interests not only in the case of reparation but also in determining whether it was possible to carry out or continue carrying out an activity which normally caused transboundary harm and, in such cases, to fix the acceptable level of harm, reparation for such harm and measures to be adopted to prevent such damage. Preventive measures should be applied not only for activities involving risk but also for those which actually caused transboundary harm. In the first case the object would be to avoid the occurrence of harm and in the second it would be to avoid an increase in transboundary harm or reduce the frequency of its occurrence. Additional protocols could be formulated concerning specific activities and establishing requirements for them.

(Mrs. Flores, Uruguay)

28. Her delegation supported the idea of including procedural norms for applying preventive measures as well as a system for the peaceful settlement of disputes. It agreed that the obligation to make reparation should fall to the operator and secondarily to the State of origin of the transboundary harm. That State should provide reparation when, for example, the operator could not be identified. There could be an obligation for the State of origin to require from the operator an adequate guarantee that he would provide reparation for any harm that occurred. The reparation should cover all damage that occurred, but could be supplemented by principles designed to regulate the amount of reparation on the basis of the criterion of balance of interests. Norms could be included to facilitate the use of domestic legislation for the purposes of securing reparation for harm. It could be established that the State of origin could not invoke immunity of jurisdiction and that there should be equality of access to courts. A more remote possibility was to provide for public defence lawyers who could defend innocent victims in the courts of the State that carried out an activity.

29. As noted in paragraph 241 of the Commission's report, the principle of liability should be based not on risk, but on the concept of harm. In the field of international law, the persons who were entitled to make claims varied according to the type of liability that was established. In the case of absolute liability, the person or persons who suffered the damage (the State and/or individuals or legal entities) would be able to claim compensation. In the case of classic international responsibility for an illegal act, only States would have the right to seek reparation. However States, through the exercise of diplomatic protection, could secure reparations for damage suffered by individuals. Her delegation felt that it would be unjust to require that an individual first exhaust domestic remedies in the State of origin of the activity; there was no connection between the innocent victim and the State of origin. The problem of immunity from jurisdiction of the State of origin of the damage also arose.

30. On the question whether an activity that normally caused transboundary harm or could cause such harm should be suspended, two situations were involved: when the activity had not yet been started or was being planned, and when the activity was being carried out. In the first case it would be useful not to begin the activity until the end of a fixed period during which negotiations should be conducted with States which might be affected so as to reach agreement; failure to reach agreement within the time-limit could amount to a veto. In the second case, it could be agreed that the activity would continue during a fixed period with the obligation of reaching a negotiated agreement; without such a time-limit, failure to reach agreement would be a means for one State to force another State to bear harm it did not wish to accept.

31. It was useful to include the problem of the construction of major works in the draft. In respect of transboundary harm caused by natural phenomena in the territory of a State, specific norms could be established for prevention

(Mrs. Flores, Uruguay)

and obligations could be laid down for the State in which the damage originated individually and in cooperation with affected States to adopt measures to reduce the harmful effects.

32. The subject of "global commons" needed to be considered separately because of the special legal regimes involved.

33. Mr. YAMADA (Japan), speaking on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", noted that the International Law Commission had held useful discussions on the seventh report of the Special Rapporteur, to whom thanks were due. The report provided a good basis for further progress in what was predominantly an exercise in the progressive development of international law rather than in the codification of existing rules.

34. With regard to the nature of the instrument being drafted he considered that, before determining what kind of legal instrument or instruments should be prepared, the Commission should clarify the types of harm to be covered by the draft articles. Existing conventions covering specific activities provided for a variety of distinct liability regimes. For example, air traffic accidents were covered mainly by civil liability, whereas in the case of nuclear accidents there was both civil and State liability and, in the case of damage caused by space objects, the State was exclusively responsible. Furthermore, with environmental problems the nature of liability varied depending on whether harm was caused to the atmosphere, the ocean or land. For those reasons, it would be difficult for the Commission to determine the nature of the proposed instrument without first clarifying and categorizing the types of harm to be covered. If the Commission was going to draw up a general framework agreement, the relationship between that agreement and existing conventions on specific activities, as well as agreements likely to be concluded on either a bilateral or a multilateral basis in the future, should be made completely clear. The framework agreement would then have value as a code of conduct or a set of guidelines or recommendations to serve as a reference for States when drawing up separate conventions. However, considering the importance of the topic as well as the Commission's own raison d'être, the Commission should not settle for a "soft law" instrument but strive to produce a legally binding document. In any event, it was essential that the Commission should determine which part of the topic was mature enough to be codified as "hard law".

35. With regard to the principles and rules applicable to liability to be included in the draft articles, his delegation did not think it was appropriate to treat the general rules of strict liability as general principles of international law in that area. Introducing the idea of strict liability also seemed premature because views on that issue were divided even among the Commission's members. Where the notion of strict liability had been incorporated in existing international laws, it was more or less confined to ultra-hazardous activities as defined in the relevant multilateral

(Mr. Yamada, Japan)

conventions; moreover, even in those conventions there was significant diversity as to the grounds for liability, the reasons for exemption, the allocation of liability and the extent to which the State was liable; procedures for remedy also varied according to the type of activity in question. In the view of his delegation, the concept of strict liability should be treated only in specific instruments covering well-defined areas.

36. A further source of complexity was the fact that the draft articles covered acts or activities which were carried out mainly by private entities, either individuals or enterprises. In the case of harm caused by the activities of transnational corporations, the question of State liability would give rise to great difficulty because the international community had not yet reached agreement on the legal status of multinational corporations or on a code of conduct to govern their activities.

37. As to the problem of harm to the "global commons", his delegation did not think it appropriate to refer to it in the proposed instrument in view of the vagueness of the concept, the difficulty of determining the State or States of origin or the State or States affected, and that of assessing the harm in question. As already stated at the forty-fifth session, Japan recognized the growing importance of protecting the "global commons". However, if the international community was to give that unexplored field the thought it deserved and deal with it on the basis of professional scientific knowledge, it would first have to decide on an appropriate mechanism for international cooperation. To establish new legal principles of international liability in that field at the current stage would be premature.

38. In view of the relationship between the topic under consideration and that of State responsibility, his delegation had initially taken the view that work on international liability should be deferred at least until the first reading of parts one to three of the draft articles on State responsibility had been more or less completed. In the light of increasing world-wide concern about the environment, however, his delegation recognized the growing need to establish rules in that field. It was to be hoped that, in the course of the future consideration of the topic, the relationship and linkage between it and State responsibility would be clarified, not only conceptually but also from the point of view of practical application to specific situations.

39. Although the Commission's work on the topic was undoubtedly of a pioneering nature, with few precedents to rely on, his Government fully recognized the need for the early establishment of legal rules in that field and therefore hoped that the Commission would hold exhaustive discussions taking into account the diverse views of its members on basic concepts and other important issues. For its part, Japan intended to contribute positively to that work.

(Mr. Yamada, Japan)

40. Turning to chapter VII of the report, on State responsibility, he said that, since the Commission had been unable to consider that topic at its forty-third session owing to lack of time, he would submit his comments following substantive deliberations at the next session. He wished to affirm, however, that his Government attached great importance to the topic and hoped that the first reading of the remaining parts of the draft articles would be completed as soon as possible.

41. Mr. ROUCOUNAS (Greece) said that, every year since 1978, the Sixth Committee and the International Law Commission had grappled with the topic under consideration, whose title bore witness to its inherent complexity. Everyone was fascinated by technological developments and sometimes alarmed by the rate at which the environment was deteriorating, but reaching agreement on the role of international law in that field was a difficult matter. However, the Commission's mandate in respect of the topic of international liability for injurious consequences arising out of acts not prohibited by international law was only indirectly related to the environment. Some agreement did appear to be forming around the proposition that the innocent victim of transboundary activities which, although lawful, entailed certain risks, should not be left to bear the costs. That proposition, however, was essentially an offshoot of the larger problem of responsibility or liability as such.

42. In view of the legal difficulties involved in establishing a causal relationship between prevention and reparation, the suggestion that the Commission might contemplate drafting two separate instruments, one dealing with liability and the other with prevention, seemed to open the way to an acceptable arrangement. Discussions in the Commission and the Sixth Committee, including the informal consultations held on the topic on 8 November 1991, offered the fullest possible picture of the main positions held with regard to the topic.

43. As stated on several previous occasions, his delegation agreed that the scope of the topic should include activities involving risk of causing transboundary harm, reparation in the event of harm, and the procedure governing reparation. In its view, the Commission's position on both aspects of the topic - prevention as well as reparation - would be strengthened by a study of internal legislation in those fields, including laws covering insurance and those applicable to specific sectors such as transport or other activities the effects of which went beyond the territory of one State or which actually took place in areas outside the jurisdiction and control of any State. With the help of such a study the Committee would be better equipped to establish a regime of reparation for transboundary harm caused by lawful activities, to be applied either to the operator alone or to the State as well. As to the suggestion that a preliminary decision should be taken on the form and the residual character of the instruments to be drafted. his delegation, would have no objection on that point but was not altogether hopeful about the outcome.

44. Mr. BOONPRACONG (Thailand), speaking first on the draft articles on the law of the non-navigational uses of international watercourses, said that his delegation, representing as it did a watercourse State, naturally attached great importance to the topic. With regard to article 2, he said that, in his delegation's view, there was clearly some virtue in not giving too broad a definition to the term "watercourse". His delegation remained uncomfortable with the use of the "system" concept, and felt that further deliberations on that point would be useful.

45. Drawing attention to the term "appreciable harm", which appeared in articles 7 and 21, the word "appreciable" also being used in articles 3 and 4, he said that his delegation was not convinced that the word "appreciable" was appropriate in the contexts in which it was used. To protect the rights of a potentially affected watercourse State without at the same time providing adequate protection for the interests of all watercourse States would be inconsistent with the principles of equity. The subjective nature of the word "appreciable" might be exploited by some watercourse States with the intention of disrupting the proper use of an international watercourse by another watercourse State. His delegation felt that terms such as "serious harm" or "substantial harm" would be preferable as allowing adequate protection of the interests of all watercourse States.

46. The principle that States in which an international watercourse originated should enjoy priority use of that watercourse was a logical extension of the principle of sovereignty; however, States enjoying priority use naturally had to do their best to prevent injury to downstream States. A proper balance had to be preserved between the interests of those two categories of States. His delegation considered that in the case of danger of a primarily natural origin, the upstream State should notify affected downstream States as soon as practicable, but when the potential injury was a result of human activities, the State of origin of the international watercourse should be legally obliged to inform other affected States promptly. The exchange of available data and information concerning the uses of a watercourse should be encouraged. Exchanges should take place on a regular basis when that was required under a specific agreement between the States concerned.

47. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he remarked that the topic continued to be a difficult one; a great deal of work still remained to be done. By way of example, he said that while there seemed to be general agreement to the effect that States should be placed under a legal obligation to prevent transboundary harm and had a duty to notify other States concerned, the extent of those duties and the penalty for failure to comply remained unclear.

48. With regard to the title of the topic, his delegation shared the view that the word "activities" would be more appropriate than the word "acts", which was felt to be too restrictive. The aim of the exercise was, after all,

(Mr. Boonpracong, Thailand)

to prevent activities, including those carried out by non-State entities, from causing transboundary harm. His delegation therefore fully supported the proposal to change the title of the topic as soon as possible.

49. It was also his delegation's view that the State of origin should be fully liable even in cases where transboundary harm was due to the activities of a private entity; in all cases of transboundary harm, the State of origin should pay compensation quickly and to the fullest extent. Lastly, on the question of the inclusion of a list of dangerous substances, his delegation wished to advocate a flexible approach. It was to be feared that an exhaustive list might hinder rather than facilitate the performance of what was already a most difficult task.

50. Turning next to the topic "Draft Code of Crimes against the Peace and Security of Mankind", he said that there again, the list of crimes included in the draft Code should be non-exhaustive with a view to maintaining flexibility. The draft Code needed to be responsive to any new and as yet unanticipated dimension of crimes. The non-exhaustive nature of the list should therefore be clearly stated.

51. The question of the establishment of an international criminal court had given rise to some highly useful and interesting discussions in the Commission. His delegation considered that efforts to identify the elements and issues involved should continue. Effective systems of universal jurisdiction did, of course, already exist for a large number of crimes. An international criminal court should only be established if the certainty existed that it would definitely add to those systems. The full implications of the establishment of such a court must therefore be carefully considered in advance. In the meantime, international efforts to enhance international cooperation in suppressing crimes against the peace and security of mankind outside the context of an international criminal court should continue with added vigour. The importance of bilateral and multilateral agreements to fight such crimes could not be overemphasized. Effective extradition treaties were vitally important, as were bilateral and multilateral treaties on mutual assistance in the area of criminal investigation prosecutions and other related proceedings. His delegation wished to urge all States to enter into as many extradition and mutual assistance treaties as possible.

52. In conclusion, he stressed the importance of the role played by the International Law Commission during the United Nations Decade of International Law. The success of the Decade depended to a great extent on the Commission's work. His delegation hoped that the Commission's next quinquennium would be as fruitful as the period currently drawing to a close.

53. Mr. PETROV (Bulgaria), referring to chapter V of the Commission's report (A/46/10), said that the inclusion in the draft articles of provisions on prevention brought the relationship between State responsibility and State liability into play. It was obvious that a State's failure to abide by its

(Mr. Petrov, Bulgaria)

obligation to prevent transboundary harm entailed that State's international responsibility. Accordingly, retaining the provisions on prevention, as advocated by many States, would lead to a dual legal regime. If transboundary harm was caused by a lawful activity, the State or the private operator, as the case might be, would be liable for compensation.

54. As stated in the report, there was a distinction to be made between procedural measures and unilateral measures of prevention. His delegation supported the predominant view in the Commission that a separate, non-binding instrument on prevention, which would include the procedural obligations of States, should be drawn up. Such a document could take the form of recommendations, guidelines or model rules to be adopted by States in connection with a specific activity. In that case, another controversial concept, about which his delegation had consistently expressed doubts, namely, "activities involving risk", would not arise.

55. A clear trend had emerged at the current session in support of the view that State responsibility should be entailed only where there was a breach of a State's legal obligations. If no such breach occurred, liability should rest with the private operator. Where a State conducted the activities in question, the State should be liable for compensation; otherwise, the State should be responsible for the breach of its legal obligations in terms of the above-mentioned unilateral measures of prevention, in other words, for the failure to act with due diligence.

56. An instrument providing for such measures could take the form of a framework convention or standards of behaviour with binding force, as proposed by the representative of Germany. Since the difference between State responsibility and State liability depended on whether the State was at fault, drafting two separate instruments, as proposed earlier, would mean that State liability would be entailed only if the State was carrying out a hazardous activity.

57. His delegation saw merit in the United Kingdom proposal that the title of the draft should be changed to "International responsibility for transboundary harm".

58. Turning to the topic "State responsibility", he said it was regrettable that the Commission had been unable to consider the third report of the Special Rapporteur. His delegation joined others in urging that priority should be given to the topic at the Commission's next session.

59. With regard to the topics to be included in the long-term programme of work of the Commission, his delegation believed that it would be preferable for the Commission to complete its work on the remaining topics already on its agenda. If a new topic was to be added, it should be done on the basis suggested by the representative of Austria.

60. Mr. RAO (India) said there were a number of reasons why relatively little progress had been made in the Commission on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", although the topic had been on the Commission's agenda for many years. First, a good deal of preliminary effort had gone into defining the parameters of the topic as distinct from those of the international watercourses topic, on the one hand, and of State responsibility on the other. Second, developments in the environmental sphere, which had been particularly rapid and sweeping in recent years, had had to be brought into focus. Third, the question of liability in any field depended on agreement being reached on the basic principles governing the activity concerned; thus, for example, liability for air pollution could only be discussed in the light of general principles governing the control or limitation of air pollution and the establishment of air quality standards. No agreement had as yet been achieved on the general principles underlying the topic under consideration. Lastly, progress had been slow because the International Law Commission had been obliged to give priority to other items on its agenda.

61. While it considered the topic to be highly important, his delegation felt that further careful analysis was called for. A conceptual framework dealing not only with liability but also with the preconditions for the operation of liability regimes should be established before giving consideration to specific draft articles. The preparatory work being done for the forthcoming United Nations Conference on Environment and Development might have some relevance in that connection. Financial and resource transfers to financially weaker and developing countries were an important means of enabling such countries to orient their economies towards environmentally friendly methods of production. Programmes of international assistance, transfer of know-how and financial aid in emergency situations, as well as assistance designed to help States to deal with natural or environmental crises, were equally important.

62. The principle that a State should bear full responsibility for any activity that might take place within its frontiers was, in his view, too simple and failed to take into account the role and responsibility of multinational corporations with independent financial resources and governing bodies answerable to no one but their shareholders. The special needs and limitations of financially weaker and developing countries should be studied carefully and in depth, as a separate matter. The dependency of such countries on foreign sources for technology, funding and even for their daily necessities should be a determining factor in apportioning liability for activities conducted within their borders.

63. Certain principles of procedure discussed during the debate in the Commission, e.g. notification, consultation, negotiation and settlement of disputes concerning an environmentally "dangerous" activity, should be defined more clearly with regard to both their contents and the scope of their application. In their current form, those principles were of little use, and their consideration raised contentious issues which might enter into conflict

(Mr. Rao, India)

with other important principles of international law, such as sovereign equality of States, sovereignty of States over their people and territory, and sovereignty over natural resources. Instead of being conducive to cooperation, many of the procedural principles in question might well lead to disputes between States, especially in the absence of an agreed understanding between them on measures to be employed, safety standards to be monitored and steps to be taken in the case of inherently or potentially dangerous activities.

64. Indeed, the question could be asked whether a common code on liability was desirable or even necessary. The view had been expressed in the Commission that, for example, activities involving nuclear hazards were best dealt with in conventions dealing with that subject, just as liability for activities involving environmental pollution or, more specifically, the ozone layer should ideally be dealt with in the separate conventions devoted to those matters.

65. In the light of those considerations, he wished to recommend that the Commission should give careful analysis to the question of its future action on the topic, possibly by setting up a special working group to consider the issue. His delegation had an open mind as to the course such future action might take, including the option of producing a set of model principles or guidelines rather than a draft convention.

66. Turning to the question of the Commission's work on other topics, particularly that of State responsibility, he said his delegation was not in a position to make specific comments on that important issue at the current stage but had no doubt that significant progress would be achieved in the coming years. As for the programme, procedures and working methods of the Commission, he would support all proposals with due regard for financial considerations. He was also inclined to support the suggestion that the session of the Commission should be split in two parts.

67. Mr. CASTILLO (Venezuela) said that the international liability of States for legal acts was an important regulatory mechanism of international relations. In the modern world, internationally wrongful acts could not be the only basis for the international liability of States, and legal activities of States also could give rise to international liability in respect of other States and of individuals.

68. His delegation joined the consensus on the principle that the State had a sovereign right to carry out lawful activities within its territory but must ensure that the activities did not cause transboundary harm. The State had an obligation to adopt all necessary measures to ensure that activities within its territory did not cause harm beyond its frontiers. The draft articles must also include the obligation to adopt preventive measures before transboundary harm occurred and to make provision for measures to deal with harm when it did occur. A State should adopt unilateral measures, whether legislative, regulatory or administrative, to restrict harm caused by an operator in its territory to another State or to individuals in that State.

(Mr. Castillo, Venezuela)

69. In respect of reparation, his delegation felt that there must be joint liability; that of the operator in the first place, and that of the State in the second. The Commission must consider the most effective way of ensuring that the innocent victim was adequately indemnified. It was essential that joint responsibility of the individual and the State should be defined clearly so as to ensure adequate reparation for harm. The principle that the innocent victim should not be left to bear the loss alone must be one of the foundations of the draft instrument.

70. His delegation shared the concern about the constant deterioration of the environment; adequate international measures and norms must be adopted to deal with that situation. However, in some cases it was difficult to determine the origin of damage and reparation for it; there were also serious difficulties in establishing mechanisms to make such determinations and defining their jurisdiction and competence. Damage to the "global commons" was not sufficiently clear to permit the establishment of the relevant legal norms and principles. Separate legal instruments should be adopted embodying the recommendations of the Stockholm Declaration and of other international texts, but the draft articles could contain a very general provision on the environment.

71. On the question of the title of the topic, his delegation felt that it was closely related to the Commission's mandate and that there was a significant substantive difference between the words "acts" and "activities" which would definitely affect the scope and content of the draft. The term "actividades" in Spanish would be broader and more in keeping with the functions of a State. The content of the draft must be brought in line with the title without departing from the mandate given to the Commission. It was important to define the nature of the instrument to be drafted; his delegation felt that a framework convention of a general nature which would facilitate and encourage the conclusion of bilateral agreements was the most appropriate solution.

72. Mr. AL-BAHARNA (Bahrain), referring to chapter VII of the Commission's report (A/46/10), said that, while time constraints had prevented the Commission from considering the topic "State responsibility" at its latest session, it was to be hoped that a high priority would be given to the topic in future years, as it was of practical importance to States.

73. The Special Rapporteur's third report on the topic dealt with the legal regime of measures that an injured State could take against a State which committed an international delict. His delegation recommended caution in the use of "reprisals" as a generic term for the unilateral measures adopted by a State; the term had long been associated with the use of force, and it was generally agreed that any act of reprisal involving force was, per se, unlawful. Moreover, in view of the controversy surrounding types of reprisals, his delegation suggested that a more neutral term should be substituted, such as "response".

(Mr. Al-Baharna, Bahrain)

74. With regard to paragraph 313 of the Commission's report, he agreed that if responses were to be lawful, an internationally wrongful act must in fact have occurred. A bona fide belief that such an act had been committed would not be sufficient to justify lawful instrumental measures. Such measures would be adopted at the risk of the responding State and would entail its international responsibility. The case of "defensive" measures against an anticipated attack illustrated that point. While his delegation agreed with the Special Rapporteur that measures might have both restitutive and penal functions, that duality obscured the distinction between the two kinds of consequences of delicts.

75. In his first two reports, the Special Rapporteur had drawn a distinction between instrumental or procedural consequences and substantive consequences, which included remedies of cessation and reparation. The overlap between those two categories could be seen in the fact that instrumental measures could be employed to secure substantive remedies. There would be less of an overlap if the remedies were differentiated on the basis of those which vested solely in one party, namely, the affected State, and those which vested in all States, either individually or jointly. The distinguishing feature was that a failure on the part of the delinquent State to repair the wrong would, in the appropriate circumstances, be seen as a secondary wrong.

76. With regard to the purposes of countermeasures, the attribution of retributive functions to them was difficult to accept, since the international community regarded the adoption of punitive measures against coequal States as abhorrent. Accordingly, he suggested that the retributive function should be accorded a secondary status and should be applied only where there was a gross abuse of the law, with grave repercussions on the affected State. It followed that great significance should be attached to the compensatory and reparative aspects of countermeasures.

77. Paragraph 315 concerned prior demands of cessation, reparation and compensation, which must always be regarded as the mandatory first step in a graduated process of responses; however, his delegation preferred not to draw distinctions of dolus in the issuance of preliminary demands, even where the delict was continuing. Demands could be dispensed with where grave danger to life and limb and irreparable harm to property were imminent, provided that the measures adopted were consistent with preventing the recurrence of such situations.

78. Paragraph 316 dealt with the question of whether responses could lawfully be undertaken by the injured State before it resorted to one or more of the dispute settlement procedures provided in Article 33 of the Charter. His delegation believed that, to the extent that the impugned delict breached or threatened to breach international peace and security, Article 33 became, ipso facto, operational, and must therefore be satisfied. Where no such international situations existed, Article 33 would not be applicable, and the rules under the proposed instrument would take precedence. As for interim measures preceding prior demands, they were difficult to accept, because they were open to abuse and were conducive to an escalation of hostility.

(Mr. Al-Baharna, Bahrain)

79. With regard to the proportionality of measures referred to in paragraph 317, his delegation was fully aware of the difficulties inherent in the concept, and considered it inappropriate to attempt to formulate a definition of proportionality. Furthermore, the relationship between proportionality and other criteria, such as the nature of the delict and the damage caused, was best kept flexible so that the scope of application of the concept would remain as wide as possible. At any rate, responses which exceeded proportionality could themselves create responsibility for the responding State.

80. Paragraph 318 referred to the suspension and the termination of treaties in response to an internationally wrongful act, a proposition which his delegation could not support because it transgressed the fundamental doctrine of pacta sunt servanda. Nor would it be more acceptable if the suspension and the termination had been caused by minor breaches. However, where the delicts were closely linked with the purposes of the treaty, it could justifiably be suspended and terminated. That would be consistent with article 60 of the 1969 Vienna Convention on the Law of Treaties. In that connection, the Commission might consider whether a material breach of a multilateral treaty creating indivisible rights between parties necessarily entitled any one or more of the parties to suspend the treaty with respect to itself as provided for in article 60, paragraph 2 (c), of the Convention. If every affected party suspended treaties, that would ensure the collapse of the treaty regime. Accordingly, his delegation was of the view that "self-contained regimes", which by definition were indivisible, should be excluded from the measures of suspension and termination, thereby giving full rein to the collective dispute-settlement machinery.

81. In the context of paragraph 319, his delegation shared the Commission's scepticism with regard to the classification of the "directly" injured and the "indirectly" injured State. Such a classification was difficult to apply in specific cases, especially where certain States tended to fall into both categories. It would be more useful to emphasize that where there was a delict, there was a remedy, the scope of which depended on the nature of the delict. The response must be compatible with the degree of injury suffered, provided that the injury was assessed according to objective criteria. Hence it was irrelevant whether the injury had been caused directly or indirectly; as long as a State could show substantial wrongdoing on the part of the offending State, there would be a right of proportionate response.

82. He agreed with the comments made in paragraphs 320 to 322 concerning substantive limitations on responses. Such limitations must be based on well-recognized rules and concepts. Countermeasures could not violate the fundamental rule against the use of force, infringe humanitarian principles or ignore jus cogens. Accordingly, limitations based on controversial rules, such as economic measures, would probably be ignored in practice. Lastly, the proposed rule should stipulate that measures adopted in contravention of those principles would entail the responsibility of the affected State.

83. Mr. ASTAPENKO (Belarus) said that the topic "International liability for injurious consequences arising out of acts not prohibited by international law", by virtue of its complexity, was not one on which rapid progress could be expected, but it was unfortunate that the Drafting Committee had been unable to consider the articles submitted to it by the International Law Commission since 1988. His delegation none the less welcomed the unanimous decision by the Commission to devote attention to the issue in the coming five years as a matter of priority.

84. Environmental concerns were generating increasing disquiet, particularly in his own country in the wake of the tragic events in April 1986 at the Chernobyl nuclear reactor. The consequences of such disasters could not be borne by one State alone, so there was clearly a need for States to cooperate in mitigating their effects.

85. The title of the draft articles, in its existing form, was cumbersome and should be amended, as suggested by the United Kingdom representative to read "International responsibility for transboundary harm".

86. It appeared from paragraph 202 of the Commission's report that opinions within the Commission differed on the nature of the instrument to be drafted. His delegation favoured a binding framework convention, provided that it would be acceptable to a majority of States. Consideration should be given to activities which involved a risk of transboundary harm and also to those which actually caused such harm. If a State engaged in the former type of activities, it must pursue a resolute policy of diminishing the element of risk, and must exercise due control of the activity. The basic principle should be that an innocent victim should not have to meet the costs of the harm caused.

87. As to the question of a list of dangerous substances or activities, his delegation would prefer to establish general criteria for determining types of activities entailing a risk of harm. A list could never be exhaustive, and would take up a great deal of the Commission's time, although it might admittedly provide guidelines for preventive measures.

88. In paragraph 223 of the Commission's report it was noted that a combination of civil and State liability seemed to be favoured by most members of the Commission. According to that approach, residual liability would be assigned to the State. His delegation considered, however, that the State in whose territory a permitted activity, in both the public and private sectors, was carried on exercised ultimate authority. It would therefore make sense to refer to a primary liability of the State at the international level to provide compensation for the harm caused to other States or to their citizens.

89. At the same time a State should not have to bear the full cost of the harm caused. He agreed with the view that a system should be established whereby regimes of State liability complemented each other. Attention should be given to the question of urgent assistance in cases of environmental

(Mr. Astapenko, Belarus)

emergency, and provision made for establishing machinery for effectively mobilizing the efforts of the international community in order to mitigate the consequences of the harm caused. A compensation fund for such emergencies might also be envisaged.

90. In that connection, he pointed out that the Standing Committee on Liability for Nuclear Damage established within the International Atomic Energy Agency in 1990 had considered the issue of compensation and its relationship to the international regime of civil liability.

91. In conclusion, he said that the issue of damage to the "global commons", referred to in paragraphs 254 to 259 of the Commission's report, should not be considered in the context of the topic of international liability, but rather as a separate part of the Commission's long-term programme of work.

92. Mr. VERENIKIN (Union of Soviet Socialist Republics), referring to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said that his delegation largely agreed with the Special Rapporteur and the Commission that international law lacked a generally accepted principle of strict liability, and that, in general, any future instrument must be based on an equitable balance between the interests of all countries. His delegation believed that such liability should arise only in the case of activities involving risk, and that the threshold for liability should be raised from "appreciable" to "significant" or "serious" harm. Consideration should also be given to establishing a list of dangerous substances or activities. Hazardous activity should be acknowledged as an essential element of strict liability, but his delegation did not accept an interpretation which would make strict liability contingent on the occurrence of transboundary harm of any kind.

93. At the same time, it would not deny the importance of the existence of harm in giving rise to liability. It was evident that liability could and should arise, not as a result of risk, but only if harm were caused as a result of a hazardous activity, and only if the activity were on a sufficient scale: harm might be caused both by lawful and by unlawful acts or activities and could lead either to strict liability or, in the case of negligence, lack of due diligence, or a breach of standards of conduct, to responsibility. The problem lay in defining the origin and nature of liability. If harm were caused by an activity involving risk, but the State concerned acted fully in accordance with its obligations, the harm caused might simply be considered the result of forces beyond the control of the State: in such a case the State in which the event took place and the State incurring the transboundary harm were both victims, and must cooperate in remedying the situation. However, failure to comply with obligations led to another kind of liability which should be clearly differentiated.

(Mr. Verenikin, USSR)

94. An equitable solution to the problem would take due account of the status and role of the operator and the State, without detracting from the latter's absolute liability for the activities of the former. It would therefore be appropriate for the draft articles to invoke the notion of civil liability of operators in conformity with State practice.

95. His delegation favoured the idea of reducing the amount of compensation payable by the State of origin if the nature of the activity and the circumstances indicated that it would be equitable to divide the cost between that State and the State suffering the transboundary harm. It should also be pointed out that the question of compensation should be contingent upon the existence of an appropriate agreement.

96. His delegation agreed with the approach in draft article 17, which listed the factors that should be taken into account by States in conducting negotiations aimed at achieving an equitable balance of interests in relation to an activity causing, or creating a risk of causing, transboundary harm.

97. Article 20 established obligations to prevent possible harm: a breach of those obligations would entail a liability which went beyond the limits of strict liability. In the light of the current practice of States, his delegation was opposed to the concept of the primary liability of the State of origin: direct material liability for transboundary harm should lie with the operator rather than the State.

98. His delegation agreed with the idea expressed in article 23 that compensation should be reduced if the State of origin had taken precautionary measures solely for the purpose of preventing transboundary harm.

99. His delegation emphasized that, in general, when the draft articles were given further consideration, the interests of the State of origin should be taken into account. The proposal to include damage to the environment merited further study in association with experts and ecologists. The topic of harm caused to the "global commons" was also important, and principles and norms for environmental protection in those areas must be developed in separate agreements which paid due regard to the specific features and status of the existing legal instruments in that field. The question of strict liability for harm caused to the "global commons", however, should be considered as a distinct and highly complex issue.

100. Mr. SUY (Belgium), speaking on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", said he agreed with the Special Rapporteur that existing international practice, which was changing rapidly, should be carefully examined before specific provisions were finalized. Any violation of international law involved an element of State liability, but the problem lay in establishing what means were available to the injured State in responding to such a violation. Generally speaking it was acknowledged that first resort must be

(Mr. Suy, Belgium)

to procedures for the peaceful settlement of disputes: an injured State could not take countermeasures, such as sanctions and reprisals, until it had exhausted those procedures, and it no longer had the unilateral right it had enjoyed in the past to exercise judgement in such matters.

101. With that background in mind he wished to raise a number of questions and considerations in connection with the Special Rapporteur's seventh report (A/CN.4/437 and Corr.1). The first was whether reference should be made in the draft articles to the suspension or termination of treaties, an area of international law which was regulated by the 1969 Vienna Convention on the Law of Treaties.

102. Secondly, the various United Nations declarations and resolutions prohibiting armed reprisals should be borne in mind in the context of countermeasures, including the requirement in Article 2, paragraph 4, of the Charter that States "refrain in their international relations from the threat or use of force". In that context it would also be desirable to bear in mind the rules and practice of the Security Council and regional organizations.

103. Thirdly, it might be appropriate to draw a distinction between the liability of a State in respect of a breach of the peace and security of mankind and a breach of its other international obligations: the consequences of violating a double-taxation agreement, for example, should be different from those arising from a violation of the prohibition on the use of armed force.

104. Lastly, he observed that the principle of proportionality of response, although clearly established, gave rise to difficult problems which might themselves engender new disputes and create situations of conflict.

105. Mr. ROSENSTOCK (United States of America) said that his delegation shared the concern expressed in the Commission and the Committee that the topic "International liability for injurious consequences arising out of acts not prohibited by international law" was not proving amenable to codification. It agreed with the representative of the United Kingdom that the topic fell naturally within the ambit of State responsibility; at its next session, the Commission should clarify the relationship between the two topics. His delegation also felt that the Commission was trying to take on too much. The topic included ultrahazardous activities about which there was a fair amount of agreement but also a wide range of other activities which could result in transboundary harm but which could well require different liability regimes. The law in many of those areas was still at a very early stage of development and if the Commission attempted to address all activities that involved risk the topic would become much too broad and unwieldy.

106. His delegation agreed that it was too early to take a definite view of the form the draft instrument should take. It felt that the Commission should focus on the preparation of guidelines or principles, on the basis of an

(Mr. Rosenstock, United States)

analysis of State practice, rather than a draft convention, and should take careful note of the summary analysis provided by the representative of Yugoslavia.

107. His delegation agreed that it would not be helpful for the Commission to prepare a list of activities to which the future instrument would apply because that would create a risk of incompleteness and overreaching. It felt that damage to the "global commons" should not be included in the topic since that subject involved significantly different considerations and was much broader in scope and would therefore delay the Commission's work. His delegation wished to make it clear that liability for harm must fall on the operator rather than the State unless the State would be liable under the existing principles of State responsibility. The Commission should give greater recognition to the relationship of the topic to the topic "State responsibility".

108. At first glance, none of the topics on the preliminary list of topics for future consideration, with the possible exception of the law of confined international groundwaters, seemed to fall clearly within the Commission's mandate or to be of sufficient importance to merit priority consideration. The Commission had enough current topics to consider in the immediate future and should concentrate on completing the first reading of the draft articles on State responsibility, including reconsideration of the controversial part one with a view to eliminating article 19 and simplifying the text. That work and the work on jurisdictional immunities would round out the Commission's work on the major classical topics within its natural area of competence as an expert body and some more specific issues would remain. The Commission's consideration of the issues of an international criminal court, and its work on international watercourses and the injurious consequences arising out of acts not prohibited by international law, would take up most of the next quinquennium; the Commission should not overload its agenda and must be able to take on short-term tasks.

109. Communication between the General Assembly, particularly the Sixth Committee, and the Commission were important and could be improved so as to enable the Commission to accord priority in accordance with the wishes of States and produce drafts that were broadly acceptable to States. The Committee could maintain its practice of topic-by-topic consideration of items and revert to the practice of hearing omnibus statements at the end of its debate. The Chairman of the Commission should introduce the Commission's report topic by topic, and give responses in the same manner at the end of the debate. States must indicate their wishes to the Commission instead of waiting until a late stage to voice objections; it was of critical importance for States to inform the Commission of any doubts about the utility of topics before scarce human resources were wasted on them. His delegation agreed with the representative of Brazil that the second part of the topic "Relations between States and international organizations" did not merit priority. States must be sure to answer requests for written comments so as to give

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adequate guidance to the Commission. The Commission, in turn, could do more to help the Committee and States focus on the questions to which it needed answers and could make a greater effort to end topics with a list of succinct questions and some alternative answers for States to choose between. The Commission could ask for written comments at turning points in its consideration rather than at the conclusion of its reading and should ask specific questions. It should also feel free to turn down requests from the Committee. The Commission could split its sessions and make greater use of small working groups and friends of the Special Rapporteur; it could also give a greater role to the Secretariat, especially now that the former political problems had disappeared.

AGENDA ITEM 131: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/46/L.7, L.9)

110. The CHAIRMAN announced that Colombia had become a sponsor of draft decision A/C.6/46/L.7 and that Hungary had become a sponsor of draft resolution A/C.6/46/L.9.

AGENDA ITEM 124: UNITED NATIONS PROGRAMME OF ASSISTANCE IN THE TEACHING, STUDY, DISSEMINATION AND WIDER APPRECIATION OF INTERNATIONAL LAW (A/C.6/46/5)

111. The CHAIRMAN drew attention to document A/C.6/46/5 on the question of the Advisory Committee on the Programme and said that the regional groups should submit candidatures of States wishing to serve on the Advisory Committee for the session beginning on 1 January 1992.

The meeting rose at 1.05 p.m.